Supreme Court, U.S.
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No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1996

ERNESTINE LEWIS and
SYLVESTER J. LEWIS, *Petitioners,*

v.

ALAMANCE COUNTY, NORTH CAROLINA,
including its Board of Commissioners
and Board of Elections, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Are the Voting Rights Act and this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), violated by the Fourth Circuit's unprecedented holding that an otherwise viable vote dilution claim must be dismissed on summary judgment solely because the plaintiffs do not present statistical evidence regarding elections in which no minority candidate competed?
2. Did the Court of Appeals err in erecting three absolute rules that, in a multi-member, at-large election system having no designated seat requirement, dictate which candidates must automatically be declared "minority preferred," without regard to the individualized evidence relevant to minority preference?
3. Did the Court of Appeals err in refusing, at the summary judgment stage, to consider evidence that incumbency was a special circumstance explaining the election of the only successful minority candidate, for the sole reason that plaintiffs did not present a statistical analysis of the benefit of incumbency?

PARTIES

The Plaintiffs in the district court included Ernestine Lewis, Sylvester J. Lewis, and Minnetta Hill, all of whom are black voters of Alamance County, North Carolina. The defendant was Alamance County, including its Board of Commissioners and Board of Elections. The Appellants in the Fourth Circuit, who are the Petitioners in this proceeding, are Ernestine Lewis and Sylvester J. Lewis, Minnetta Hill having moved out of the county.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on November 4, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996). The opinion is reprinted in the appendix hereto, p. A-34, *infra*.

The memorandum opinion of the United States District Court for the Middle District of North Carolina (Osteen, D.J.) has not been reported. It is reprinted in the appendix hereto, p. A-1, *infra*.

JURISDICTION

On November 4, 1996, the Court of Appeals for the Fourth Circuit affirmed a decision of the United States District Court for the Middle District of North Carolina in this matter. Petitioners filed a timely petition for rehearing, which the Fourth Circuit denied on December 4, 1996.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial

or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right tc have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

Only one black candidate has been elected to the five-member Board of Commissions in Alamance County, North Carolina, since the passage of the Voting Rights Act in 1965. Because of this electoral history, petitioners, who are black voters from Alamance County, brought this action under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, challenging the County's at-large method of electing its commissioners on the ground that black citizens have been denied an equal opportunity to elect representatives of their choice through vote dilution.

Alamance County is governed by its Board of Commissioners. Members are elected to four-year staggered terms. (A-2) The elections are partisan, and nomination of candidates occurs in party primaries held in the spring before the November general election. (*Id.*) All candidates run at-large, and there is no designated seat or residency requirement. Voters may cast the number of votes equal to the number of vacant seats, but may only cast one vote per candidate. (*Id.*)

The 1990 census shows that Alamance County's population is 79.8% white, 19.2% black. (A-4) Voting age population is 81.2% white, 18.0% black. (*Id.*) As of April 1994, the population of registered voters was 84.1% white, 15.5% black. (*Id.*) Accordingly, if *all voting age* blacks registered to vote and then voted for a particular preferred candidate, that candidate would still have to win 40% of the white *voting age* population's votes to secure a majority in a head-to-head contest.[1]

From the 1965 passage of the Voting Rights Act until 1994, black candidates ran for seats on the Board in eight of the fourteen election cycles. (A-3-4, 22-32)[2] Only one black candidate, Jack O'Kelley, has ever been elected. O'Kelley was, however, appointed to fill a vacancy before his initial election, and was first elected in a special, single-seat contest. (A-23) Since 1972, a minority candidate has received 70% or more of the black vote in all but one primary or general election in which black candidates have run. (A-22-32) While most black candidates garnered an overwhelming majority of the votes from black voters, no black candidate except O'Kelley has ever gained more than 35% of the white vote in the Democratic primary nor more

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[1] White VAP = 81.2% x .4 = 32.48% + 18.0% black VAP = 50.48%.

[2] The results of the statistical analysis for each election are reproduced as an appendix to the district court opinion. (A-22-32)

than 24% in the general election. (*Id.*) O'Kelley was elected three times – in 1974 (in a special election for the remainder of a term ending in 1976), in 1976, and in 1980. Since 1980, no black candidate has been elected to the Board.[3] (*Id.*) As difficulties of blacks being elected have become clear through experience, fewer black candidates have entered races. No black candidates at all ran in general elections in 1972, 1978, 1982, 1988, 1990 and 1992. (A-22-32)

The statistical analysis of elections accepted by the district court also demonstrated that support for black candidates diverged widely between black voters and white voters. When the votes received by all black candidates are averaged, black voters voted for black candidates at the rate of 81%, while white voters voted for black candidates at the rate of 29%. Only once in a multi-seat race has a black candidate succeeded who would not have won had the election been held among only white voters: in 1980, O'Kelley was fourth among white voters but won election. (A-28) Thus, in the years since the passage of the Voting Rights Act, black voters of Alamance County have only one time been able to overcome the effects of white bloc voting in a multi-seat commissioner race to elect a black candidate who was not chosen as a winner by white voters.

In the district court, the county moved for summary judgment, contending that plaintiffs had failed to establish genuine issues of material fact on any of the three prongs of the vote dilution test established by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Those three prongs, in the context of vote dilution through the use of multi-member electoral districts, are that, first, the minority group must demonstrate that "it is sufficiently large and geographically

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[3] A white candidate was the minority-preferred candidate in 1986 and was successful. (A-31)

compact to constitute a majority in a single-member district." *Id.* at 50. Second, the group must show that "it is politically cohesive." *Id.* at 51. Third, the minority group must show that "the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, . . . usually to defeat the minority's preferred candidate." *Id.*

The district court found that plaintiffs' evidence met the first two parts of this test.[4] In particular, regarding the second element of the *Gingles* test, the district court concluded that, "[a]lthough Defendant contends that the Alamance County black community is divided into several factions, the overwhelming evidence indicates that the Alamance County black community is a cohesive group . . . [and] that black voters usually vote for the same candidates." (A-18-19)

The district court granted the county's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure,[5] concluding that plaintiffs had not met their burden to show that black voters' preferred candidates are usually defeated by white bloc voting as required by the third part of the *Gingles* test.

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[4] The district court found that plaintiffs met their burden, for summary judgment purposes, to show the black population of Alamance County is geographically compact. (A-13) Therefore, no issue of "race-based redistricting" is raised in this case, contrary to the suggestions of the concurring opinion below. (A-71-72)

[5] Rule 56 provides in pertinent part, that a party moving for summary judgment must establish "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c). In reviewing a grant of summary judgment, the Court must draw all permissible inferences from the underlying facts in the light most favorable to the *non-moving* party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

On appeal, the Fourth Circuit, in a divided opinion, affirmed, but on different grounds than the district court. First, although the issue was not raised by the county nor considered by the district court, the panel majority held that the district court erred in even considering the case when the plaintiffs had presented evidence only of elections in which black candidates had competed. The majority held that a plaintiff in a Section 2 vote dilution case must offer evidence of "a representative cross-section of elections, and not merely those in which a minority candidate appeared on the ballot, at least where elections in which minorities were on the ballot do not constitute a substantial majority of the total number of elections." (A-47)

The Fourth Circuit also affirmed on the ground that even considering the evidence before the district court, the plaintiffs had not presented sufficient evidence that the white majority voted as a bloc usually to defeat the minority-preferred candidates. (A-54) The majority reached this determination by announcing four new, absolute rules for determining which candidates in multi-seat races were minority-preferred based upon electoral results alone and without any individual determination of the facts involved. Those rules are that:

- any successful second- or third-place finisher in the election is automatically declared a minority-preferred candidate if the first choice of minority voters was unsuccessful but received a percentage of the minority vote not significantly greater than the percentage received by the successful second- and third-place finishers; (A-54-55)

- "any candidate who receives a *majority* of the minority vote and who finishes behind a *successful* candidate who was the first choice

among the minority voters is automatically to be deemed a black-preferred candidate. . . ."; (A-60-61) (emphasis in original)

- "all general election candidates who received 99+% of the black community's vote [are deemed] black-preferred, without reference to the underlying primary election"; (A-65)

- incumbency of the only successful minority candidate will not be examined as a "special circumstance" explaining that success if plaintiff does not present a statistical analysis of the effects of incumbency. (A-67)

The dissent strongly challenged both grounds of affirmance. The dissent pointed out that "no court before today" had ever dismissed a vote dilution claim solely because the plaintiffs did not present evidence of elections in which only whites were candidates. (A-80) The dissent reviewed cases from other circuits establishing that the trial court *may* consider evidence of white-only elections, but concluded that imposing upon the plaintiff the burden to offer such evidence conflicted with the Voting Rights Act, this Court's decision in *Gingles*, and the decisions of the other circuits. (A-81-84) In the dissent's view, the "extensive election data" offered by the plaintiffs, which encompassed "a majority of the county commissioner elections held within two decades preceding the filing of their complaint," satisfied plaintiffs' burden, particularly because elections involving black and white candidates are the "most probative" and because the county did not contend that the black community had sponsored "a significant number of white candidates." (A-83-84)

The dissent also found "fundamentally flawed" the majority's newly-announced rules for automatically

considering certain candidates to be minority-preferred. (A-86) Instead, the dissent emphasized this Court's holding in *Gingles* and the holdings from many other circuits, that the determination of minority preference is a fact-intensive process which must be conducted on an individualized basis:

> Both Section 2 of the Voting Rights Act and *Gingles* demand a more searching inquiry than mere reference to the percentage of minority voter support that a candidate has received, particularly when the candidate is not a minority and an at-large voting system is employed. At the very least, we must examine the particular circumstances of each case to discern whether the electoral support that minority voters give a candidate (especially in general elections) truly reflects minority voters' preference or whether such support is itself a manifestation of a structural inequality in the challenged voting system. (A-91-92)

The dissent concluded that the statistical and other evidence accepted by the district court supported a finding that there "have been eight minority-preferred candidates, two who were elected and six who were not," and that this evidence precluded summary judgment. (A-108)

REASONS FOR GRANTING THE WRIT

Section 2 of the Voting Rights Act was amended in 1982 to add a "results test" as a means of proving unlawful vote dilution.

> The results test of § 2 is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment "to confront its conscience and fulfill the guarantee of the Constitution" with respect to equality in voting. . . . Congress considered the test "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights." . . . It believed that without the results test, nothing could be done about "overwhelming evidence of unequal access to the electoral system," . . ., or about "voting practices and procedures [that] perpetuate the effects of past purposeful discrimination," . . . . And it founded those beliefs on the sad reality that "there still are some communities in our Nation where racial politics do dominate the electoral process."

Bush v. Vera, ___ U.S. ___, ___, 116 S.Ct. 1941, 1969 (1996) (O'Connor, J., concurring) (citations to S. Rep. No. 97-417 (1982), U.S. Code Cong. & Admin. News 1982, omitted).

In three fundamental respects, the Fourth Circuit's decision below hobbles Section 2 and its results test for proof of vote dilution.

I. THE FOURTH CIRCUIT'S UNPRECEDENTED DECISION CONFLICTS WITH THE DECISION OF THIS COURT IN *THORNBURG v. GINGLES* AND DECISIONS OF THE OTHER CIRCUITS ADDRESSING THE ISSUE BY DISMISSING AN OTHERWISE VIABLE VOTE DILUTION CLAIM SOLELY BECAUSE THE PLAINTIFFS DID NOT OFFER STATISTICAL EVIDENCE REGARDING ELECTIONS IN WHICH NO MINORITY CANDIDATE COMPETED.

The Fourth Circuit's decision in this case is directly contrary to the language of the Voting Rights Act and to this Court's landmark Section 2 decision, *Thornburg v. Gingles*, 478 U.S. 30 (1986). Section 2 of the Voting Rights Act specifically states that in evaluating whether Section 2 has been violated, "[t]he extent to which *members of a protected class* have been elected to office in the State or political subdivision is one circumstance which may be considered. . . ." 42 U.S.C. § 1973(b) (emphasis added). Thus, a critical component of the trial court's intensely fact-based inquiry into the electoral circumstances, and the only specific circumstance to be emphasized by Congress, is the extent to which members of the protected class have been elected. *Id.* The Fourth Circuit's decision would gut the Act of this specific provision and would violate this Court's application of that provision in *Gingles*.

In *Gingles*, this Court affirmed findings of vote dilution based on election data which included only elections in which a minority was a candidate and which only spanned three election cycles. The Court concluded

> that the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates'

> usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard.

478 U.S. at 61.

Here, the evidence presented more than met the *Gingles* standard. Plaintiffs analyzed results from eight of the eleven elections for county commissioner occurring in the twenty years preceding the filing of their complaint, and from every contest in which black and white candidates competed. The county was free to, but did not, offer election data from any other elections and did not otherwise dispute the analysis performed by the plaintiffs. The county did not argue and the district court did not address whether white-only elections must be considered. Nevertheless, the Fourth Circuit held that the case should be dismissed solely because the plaintiffs did not offer evidence of a substantial majority of the white-only elections.

The decision below flatly contradicts this Court's guidance in *Gingles* concerning how elections are to be analyzed. *Gingles* plainly held that:

> The number of elections that must be studied in order to determine whether voting polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

478 U.S. at 57 n. 25. Thus, *Gingles* makes clear that the number and type of elections which must be analyzed in a vote dilution case depends upon the particular circumstances presented. This flexibility in the analysis was recently reaffirmed by this Court in *Vera*: evidence regarding the *Gingles* factors "need not take any particular form...." *Bush v. Vera*, 116 S.Ct. at 1970 (O'Connor, J., concurring). The Fourth Circuit, with absolutely no basis in precedent, has rejected this principle and replaced it with a rigid test requiring, in all cases, analysis of a "substantial majority" of all elections and inclusion in that analysis of a representative cross-section of elections in which no minority candidate competed. (A-53-54)

Although many courts have recognized that evidence of white-only elections may be relevant to a Section 2 analysis, no court until this decision has held that the plaintiffs have the burden to offer such evidence in all cases. Instead, the other circuits, adhering to the explicit language of Section 2(b) and the holding of *Gingles*, have recognized that elections with minority candidates are more probative than white-only elections. Several circuits, including the Third, Fifth and Tenth, have specifically held that plaintiffs are *not* required to present evidence of white-only elections. Resolving this conflict among the circuits is critical to the continued vitality of Section 2 and the results test established by Congress.

The Third Circuit has recently held:

> We . . . do not believe that plaintiffs are required to present evidence on white versus white elections if they do not believe that those elections are probative. If the defendants want to introduce evidence on those elections in an attempt to rebut the plaintiffs' evidence of cohesiveness or white bloc voting, they may do so. Nevertheless, because

> white versus white elections tend to be less probative, there may still be cases in which "[t]he evidence of polarized voting . . . is so strong . . . that it cannot be overcome even when all reasonable inferences are accorded to the evidence of elections involving only white candidates."

Jenkins v. Red Clay Consolidated School District, 4 F.3d 1103, 1128-29 (3d Cir. 1993) *cert. denied*, 114 S.Ct. 2779 (1994),(quoting *Smith v. Clinton*, 687 F. Supp. at 1310, 1317) (E.D.Ark.), *affirmed*, 488 U.S. 988 (1988).

The Fifth Circuit has also explained that the evidence most probative of racially polarized voting must be drawn from elections in which black and white candidates compete. *Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109, 1119 n.15 (5th Cir. 1991); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987), *cert. denied*, 492 U.S. 904 (1989). Similarly, in *Campos v. City of Baytown, Texas*, 840 F.2d 1240 (5th Cir. 1988) *cert. denied*, 492 U.S. 905 (1989), the district court examined only elections which had a minority as a candidate, and the Court of Appeals addressed the defendant's argument that the court should have examined white-only races. The Fifth Circuit disagreed, holding that "the district court was warranted in its focus on those races that had a minority member as a candidate." 840 F.2d at 1245. The Fifth Circuit read *Gingles* as focusing on whether a candidate was sponsored by the minority group, not simply whether the candidate received a majority of votes from minority voters. *See also, East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*, 926 F.2d 487, 493 (5th Cir. 1991) ("district court did not err by limiting its investigation of racial polarization to elections involving black candidates").

More recently, the Fifth Circuit in *Teague v. Attala County*, 92 F.3d 283 (5th Cir. 1996), the plaintiffs offered evidence concerning elections with black candidates, which showed very high correlations between voting behavior and the racial composition of the district, but the district court nevertheless found plaintiffs had failed to meet their burden of proof under *Gingles*. The Fifth Circuit reversed, holding that one election relied upon by the district court "should not even have been examined" because it involved a marginal black candidate and because the district court erroneously placed the burden on plaintiffs to disprove that factors other than race affected voting patterns in the county. 92 F.3d at 289. The court held that "plaintiffs are to present evidence of racial bias operating in the electoral system by proving up the *Gingles* factors. Defendants may then rebut the plaintiffs' evidence by showing that no such bias exists in the relevant voting community." *Id.* at 290.[6]

The Tenth Circuit, in *Sanchez v. State of Colorado*, 97 F.3d 1303 (10th Cir. 1996), also considered whether evidence of white-only elections must be presented. The court held that a detailed factual inquiry is necessary into the electoral history, for

> without that evaluation and with a history of Anglo/Anglo contests, we fall prey to the myopic presumption there is a minority preferred candidate in any race in which the minority votes.

Id. at 1320-21. The Tenth Circuit held that the court must engage in a detailed, practical evaluation of the extent to which any particular white candidate was the representative

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[6] The ruling in *Teague* makes clear that the Fifth Circuit has not "substantially retreated" from its earlier holdings in *Gretna*, *Campos*, and *Westwego*, as the majority below asserted. (A-50)

of choice of minority voters and reversed the district court's decision which had rejected plaintiff's use of "the same statistical method approved in *Gingles*." *Id.* at 1321.

In purported support of its unprecedented holding, the panel majority cited decisions from other circuits, including the First, Second and Eighth, but none of those decisions hold that vote dilution plaintiffs must offer a statistical analysis of elections in which no minority candidates competed. In *NAACP v. City of Niagra Falls*, 65 F.3d 1002 (2d Cir. 1995), relied upon by the majority, the plaintiffs offered a statistical analysis of elections in which minority candidates ran, including nine elections spanning the period from 1969 to 1991. The city offered evidence concerning additional elections in which no black candidate ran. The Second Circuit did *not* hold that the plaintiffs' claim failed for lack of evidence of white-only elections, but instead held that evidence about such elections is relevant and may be considered. 65 F.3d at 1016-17. The Second Circuit then affirmed the district court's conclusion that the plaintiffs had established that the white majority voted sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Id.* at 1018.

Similarly, in *Harvell v. Blytheville School District No. 5*, 71 F.3d 1382 (8th Cir. 1995) (*en banc*), *cert. denied*, 116 S.Ct. 1876 (1996), plaintiffs offered evidence only of elections in which black candidates ran. Defendant offered no contradictory evidence. The Eighth Circuit held that the defendant had violated Section 2. In reaching this conclusion, the court did not require analysis of additional elections.

Finally, in *Uno v. City of Holyoke*, 72 F.3d 973 (1st Cir. 1995), again relied on by the majority below, plaintiffs offered evidence only of elections in which minority candidates ran. The district court found that impermissible

vote dilution existed. The First Circuit vacated that finding because the district court failed to articulate clearly the grounds for its vote dilution finding, not because the plaintiffs failed to offer evidence of other elections. 72 F.3d at 989.

Finally, the decision below conflicts even with a long line of decisions from the Fourth Circuit. For example, in *Cane v. Worcester County*, 847 F.Supp. 369 (D.Md. 1994), *affirmed in relevant part*, 35 F.3d 921 (4th Cir. 1994), *after remand*, 59 F.3d 165 (4th Cir. 1995), *cert. denied*, 115 S.Ct. 1097 (1995), the Fourth Circuit affirmed a finding of a Section 2 violation regarding elections of county commissioners in Worcester County, Maryland, where the only county commissioner elections analyzed were the *two* "in which the minority-preferred candidate was an African-American." *Id.* at 926. The district court in *Cane* examined "exogenous" elections (elections for offices other than county commissioner) but did not consider county commissioner races other than the two in which the minority-preferred candidate was a minority.

The Fourth Circuit's error is not simply one of statistical methodology. It is, instead, one of profound importance to the vitality of Section 2 of the Voting Rights Act. Section 2 is designed to remedy vote dilution in those jurisdictions where racial polarization "robs the minority of meaningful access to the political process." *Sanchez v. Colorado*, 97 F.3d at 1321. Under the Fourth Circuit's new proof requirement, the most discrimination-prone jurisdictions with the most racially polarized electoral systems in which few blacks offer themselves for election will be sheltered from Section 2 liability if a majority of the black voters voted for successful white candidates. This is exactly the opposite of what Congress intended in amending Section 2. The language of Section 2 that the extent to

which *members of the protected class* have been elected to office would vanish from the Act. This simplistic, paint-by-the-numbers approach to vote dilution is completely contrary to this Court's and Congress' direction that trial courts engage in a searching practical evaluation, in a manner peculiarly dependent upon the facts of each case, to determine whether the political process is equally open to minority voters. *Gingles*, 478 U.S. at 79.

The statistical analysis of voting in Alamance County showed that black voters are strongly cohesive and that elections are overwhelmingly racially polarized. In this context, and with only one black candidate ever having succeeded, an analytical requirement which calls for summary judgment and dismissal of the case solely for the reason that a substantial majority of the white-only elections were not also analyzed *by the plaintiff*, should not be permitted to stand. This Court should grant the petition for writ of certiorari to correct the Fourth Circuit decision because it conflicts with the statutory language, this Court's ruling in *Gingles*, and the decisions of other circuits.

II. SECTION 2 OF THE VOTING RIGHTS ACT AND THIS COURT'S DECISION IN *GINGLES* DEMAND A SEARCHING INQUIRY CONCERNING WHICH CANDIDATES ARE PREFERRED BY MINORITY VOTERS, AND DO NOT PERMIT PREFERRED CANDIDATE DETERMINATIONS MADE AUTOMATICALLY UPON THE PERCENTAGE OF MINORITY VOTER SUPPORT A CANDIDATE HAS RECEIVED.

The Fourth Circuit adopted three blanket rules for declaring certain candidates to be minority-preferred regardless of what the evidence might show concerning the true level of support those candidates actually enjoy among minority voters. The majority opinion declared that:

- any successful second- or third-place finisher in the election is automatically a minority-preferred candidate if the unsuccessful first choice of minority voters received a percentage of the minority vote not significantly greater than the percentage received by the successful second- and third-place finishers; (A-56)

- "any candidate who receives a *majority* of the minority vote and who finishes behind a *successful* candidate who was the first choice among the minority voters is automatically to be deemed a black-preferred candidate. . . ."; (A-54) (emphasis in original)

- any candidate who received 99+% of the black vote in a general election is declared minority-preferred no matter what the evidence might be concerning the presence or absence of minority support for the candidate during the primary election. (A-65)

These rules rob the vote dilution analysis of its vitality.

The Senate Committee Report accompanying the 1982 amendments to Section 2, which is the "authoritative source" for determining Congressional intent in adopting those amendments, *Thornburg v. Gingles*, 478 U.S. at 43, n.7, instructed that a district court must engage in a "flexible, fact-intensive" evaluation of the electoral history in question, necessitating a "searching practical evaluation of the past and present reality . . . and . . . functional view of the political process." 478 U.S. at 45-46, *quoting* S. Rep. No. 97-417. The analysis must include "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. *Gingles*, 478 U.S. at 79, quoting *Rogers v. Lodge*, 458 U.S. 613, 621 (1982).

In a vote dilution claim, proper identification of minority voters' preferred candidates is "critical." *Collins v. City of Norfolk*, 883 F.2d 1232, 1237 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990). That identification is particularly important in cases involving a multi-member district with no designated seat requirements, because application of blanket rules in this context can mask true voter preferences behind the fact that voters may cast ballots for as many candidates as there are seats open. In the words of the Tenth Circuit, a simplistic analysis of at-large voting schemes may foster the "myopic presumption" of minority preference for a candidate where that preference does not exist, because minority voters face the choice of either voting for a candidate they do not actually prefer or not voting at all. *Sanchez v. State of Colorado*, 97 F.3d at 1303 (10th Cir. 1996). Determination of which candidates are preferred instead requires a searching inquiry when at-large elections are analyzed, because at-large voting schemes permit voters to cast votes for as many candidates as there are seats open, even though the minority voters may not strongly prefer or sponsor as many candidates as there are seats open.

The automatic and inflexible rules adopted by the Fourth Circuit in this case for determining minority preference not only conflict with *Gingles*, such rules have been rejected throughout the circuits. *See, Jenkins*, 4 F.3d at 1126 ("It is important to look beyond whether a white candidate received a majority of the minority community's vote and determine whether that white candidate is truly the minority community's representative of choice"); *Uno v. City of Holyoke*, 72 F.3d at 989 ("[D]etermining whether racial bloc voting exists is not merely an arithmetic exercise that consists of toting up columns of numbers, and nothing more. To the contrary, the district court should not confine itself to raw numbers, but must make a practical, common

sense assay of all the evidence."); *NAACP v. Niagra Falls*, 65 F.3d at 1019 ("even if a candidate receives 50% or more of the minority vote, a court need not treat the candidate as minority-preferred if another candidate receives significantly higher support"); *Campos v. City of Baytown*, 840 F.2d at 1245 (rejecting the argument that "anytime a candidate gets a majority of the minority votes he is the 'chosen representative' of the minority group"). As the Third Circuit stated that in deciding which, if any, white candidates were minority-preferred in *Jenkins*,

> "the court must engage in a detailed, practical evaluation of the extent to which any particular white candidate was, as a realistic matter, the minority voters' representative of choice. . . . This inquiry, while complex, is nevertheless flexible, and we believe that it best furthers the purposes of the Voting Rights Act. Courts, however, should be especially careful to explain fully their reasons for finding that a particular non-minority candidate was minority preferred and their conclusions as to the impact of that election on the overall analysis."

4 F.3d at 1120.

Indeed, until this decision, even the Fourth Circuit had rejected the mathematical absolutism of finding successful candidates to be minority-preferred simply because they received over 50% of the minority votes, where other candidates received a much greater percentage:

> [t]he mere election of a candidate who appears to have received votes from more than fifty percent of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred

> by a significantly higher percentage of the minority community, who were defeated in the same election, then it cannot fairly be said that the minority community has successfully elected representatives of its choice. *Each situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community.* The presumption must be that they cannot, if some other candidate has received significantly more minority votes.

Collins, 883 F.2d at 1238 (emphasis added).

The blanket rules adopted below will result in undermining the purpose of the Voting Rights Act by allowing those very features of the at-large system which dilute the minority's vote to hide that dilution. When the preferred candidate of minority voters does not win a primary election, and those voters proceed to vote for other candidates in the general election who they had not supported to a significant degree in the primary, the success of such candidates cannot be automatically declared to signify the preference of the minority voters. Only by examining all of the evidence, including the evidence of votes cast in the primary election, can a trial court determine whether those successful candidates were truly supported by minority voters. This Court announced this principle in *Gingles*, and all of the other circuits have adhered to it by refusing to adopt the sort of arbitrary and discriminatory rules as have been announced in this case.

This Court should grant certiorari in order to resolve the conflict between the decision in this case and this Court's decision in *Gingles*, to restore the vitality Congress has invested in Section 2, and to resolve the conflict among the circuits.

III. THE COURT OF APPEALS ERRED WHEN IT REFUSED, AT THE SUMMARY JUDGMENT STAGE, EVEN TO CONSIDER EVIDENCE THAT INCUMBENCY WAS A SPECIAL CIRCUMSTANCE EXPLAINING THE ELECTION OF THE ONLY SUCCESSFUL MINORITY CANDIDATE, FOR THE SOLE REASON THAT PLAINTIFFS DID NOT PRESENT A STATISTICAL ANALYSIS OF THE BENEFIT OF INCUMBENCY.

In granting summary judgment, the district court placed great weight on the election of the single successful minority candidate, Jack O'Kelley, and declined without explanation to discount that success due to the effects of O'Kelley's initial appointment to office and his running as an incumbent. (A-19) The undisputed record before the district court on summary judgment was that since 1972, seven black candidates ran for the Board and only one, O'Kelley, who was first appointed, then ran as an incumbent in a special single-seat election, and then as an incumbent in a multi-seat election, was elected.

The Fourth Circuit majority noted that the district court offered no explanation of its decision not to discount O'Kelley's successes, but did not disturb that decision "given that plaintiffs' own expert did not analyze the effects of incumbency for O'Kelley or for any other candidate." (A-67)[7] With this pronouncement, the Fourth Circuit adopted a requirement that plaintiff present a statistical analysis of the effects of incumbency, thereby permitting the district court to ignore completely, even on summary

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[7] The Court of Appeals again demonstrated its failure to view the evidence *de novo* as required on appeals from the granting of summary judgment when it stated that it would not reverse the district court's decision regarding incumbency "as clearly erroneous." (A-67)

judgment, other facts bearing on the special circumstance of incumbency.

This unprecedented holding once again violates *Gingles*' requirement that the facts underlying a minority-preferred candidate's success be examined fully to determine whether special circumstances explain that election. *Gingles* specifically listed incumbency as a special circumstance which may explain minority electoral success in a polarized contest. 478 U.S at 57. *Gingles* also emphasized that Congress intended the trial court to conduct a "searching practical evaluation of the 'past and present reality,'" and intended the trial court not treat the fact that some black candidates have succeeded as dispositive of a Section 2 claim. *Id.* at 62-26, *quoting* Senate Committee Report at 29, n.115. Indeed, in *Gingles*, the trial court found that incumbency aided a successful black candidate in a particular election, discounted that success, and the finding was approved by this Court. 478 U.S. at 60 n.29.

Most importantly, *Gingles* flatly rejected the contention that statistical analysis of the causal impact of incumbency must be presented:

> According to appellants and the United States, only multiple regression analysis, which can take account of other variables which might also explain voters' choices, such as . . . incumbency . . . can prove that race was a primary determinant of voter behavior. . . . We disagree.

478 U.S. at 61-62. Thus, *Gingles* established that a vote dilution plaintiff need not present a statistical analysis demonstrating that incumbency is a special circumstance explaining either minority electoral success or lack of success, in order to have the trial court consider the circumstance in its evaluation of all of the evidence.

The other circuit courts, unlike the Fourth Circuit, have followed this aspect of *Gingles*. In *United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984), one black had been appointed to the school board, and one other county-wide election had been won by a black candidate. The district court rejected the vote dilution claim based this evidence, holding that the evidence did not indicate a lack of effective access to the electoral system. The Eleventh Circuit reversed and instead "interpreted these electoral results" as "strong evidence of dilution," without requiring any statistical analysis of the particular effects of appointment or incumbency. 731 F.2d at 1572.

In *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1484 (11th Cir. 1993), incumbency following initial appointment was held to explain the success of three out of four successful black candidates. The minority electoral success of the incumbents therefore did not defeat a finding of vote dilution. The evidence was evaluated without reference to any statistical analysis of the effect of incumbency. *See also, Collins v. City of Norfolk*, 883 F.2d at 1243 (incumbency was a significant factor in black electoral success where no black incumbent was ever defeated and almost no black candidate who was not an incumbent was ever elected; evidence evaluated without a specific statistical analysis of the effect of incumbency); *Harvell v. Blytheville School District No. 5*, 71 F.3d at 1389 (victory of a black candidate who beat a white candidate head-to-head discounted as a special circumstance due to incumbency without statistical analysis of the effects of incumbency); *Clarke v. City of Cincinnati*, 40 F.3d 807, 814 (6th Cir. 1994), *cert. denied*, 115 S.Ct. 1960 (1995) (incumbency considered not to be a special circumstance where several successful black candidates were first elected as challengers rather than as incumbents; circumstance

evaluated without statistical analysis of the effects of incumbency).

The present case is on appeal from a grant of summary judgment. The undisputed facts concerning O'Kelley's initial appointment, his election in a single-seat special election in 1974 rather than an at-large contest, his subsequent re-election as an incumbent, and the fact that he was the only black candidate *ever* elected raise genuine issues of material fact concerning whether his success should be tempered when measuring the degree to which white bloc voting usually defeats minority-preferred candidates in Alamance County. The Fourth Circuit's unexplained and arbitrary erection of a requirement that statistical analysis be presented to trigger such scrutiny is unprecedented and entirely contrary to the purposes of the Voting Rights Act and this Court's holding in *Gingles*.

This Court should grant certiorari to correct this error and to resolve the conflict among circuits this decision has created regarding whether a statistical analysis must be presented in order to consider incumbency a "special circumstance" explaining black electoral success.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ERNESTINE LEWIS, SYLVESTER J. LEWIS, and MINNETTA E. HILL,	)	
Plaintiffs,	)	
v.	)	2:92CV00614
ALAMANCE COUNTY, NORTH CAROLINA, including its BOARD OF COMMISSIONERS AND BOARD OF ELECTIONS,	)	
Defendant.	)	

MEMORANDUM OPINION

OSTEEN, District Judge

This matter comes before the court on Defendant Alamance County's Motion for Summary Judgment.[1] Plaintiffs Ernestine Lewis, Sylvester J. Lewis, and Minnetta E. Hill are black residents and registered voters of Alamance County, North Carolina. In the Complaint, Plaintiffs allege that the at-large method of electing the Alamance County Board of Commissioners has the effect of denying black citizens an equal opportunity to elect candidates of choice in violation of Section 2 of the Voting

[1] Defendant is Alamance County, North Carolina, including its Board of Commissioners and Board of Elections, collectively referred to herein as Defendant.

Rights Act, 42 U.S.C. § 1973 (1994). Plaintiffs also claim that the method of election was adopted purposefully to dilute the voting strength of black citizens in violation of the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. Plaintiffs have not opposed the granting of summary judgment on the constitutional claims. Having reviewed the entire record, the court will grant Defendant's Motion for Summary Judgment.

I. BACKGROUND

The governing body of Alamance County, North Carolina, is the Board of Commissioners ("Board"), consisting of five members elected for four-year terms, with the chairperson selected by the Board members. Generally, the partisan general elections are sharply contested encounters in which each political party has experienced the exhilaration of victory and the agony of defeat. The terms are staggered with three members elected in years divisible by four (1992, 1996, etc.) and two members elected in the intervening years (1994, 1998, etc.). Nomination of candidates is at party primaries held in the spring before the general election. In the primary, a candidate must receive 40% of the votes cast for that office to be nominated without a run-off. Election is by majority vote. All elections in Alamance County are conducted by the Alamance County Board of Elections that consists of five members. Gilberta Mitchell, a black female, was appointed to the Board of Elections in 1977 and continues to serve on that board.

Defendant admits that in the distant past there was discrimination against black citizens in the electoral process in Alamance County. (Answer at 2.) However, Defendant denies any recent discrimination that affects the present ability of black citizens to participate in the political

process. In the past twenty-three years, black citizens who have been candidates for the Board have had some success, along with some losses, as indicated below:

1972 - W.I. Morris lost in Democratic primary for 3 seats

1974 - Jack O'Kelley won general election for unexpired term of vacant seat (one Democrat and one Republican won election for two seats; O'Kelley, Democrat, won election for vacant seat)

1976 - Jack O'Kelley won in Democratic primary and in general election for 3 seats (three Democrats won general election)

1978 - Ron Harris and Frank White, Sr. lost in Democratic primary for 2 seats

1980 - Jack O'Kelley won in Democratic primary and in general election for 3 seats; Theodore Howard lost in Democratic primary (two Democrats and one Republican won general election)

1984 - J.A. Freeman won in Democratic primary and lost in general election for 3 seats (as did all three Democrats)

1986 - W.I. Morris was nominated without a primary and lost in general election for 2 seats (one Democrat and one Republican won general election)

1992 - Ron Torain lost in Democratic primary for 3 seats[2]

(Def.'s Evidentiary Submission Supp. Mot. Summ. J. Ex. I at 3-4.)

The population of Alamance County, according to the 1990 census, is 108,213 persons. Of that population, 86,373 (79.8%) people are white, and 20,822 (19.2%) are black. The voting age population is 84,538 -- 68,636 (81.2%) are white; 15,190 (18.0%) are black. In April 1994, there were 60,020 registered voters, with 50,495 (84.1%) being white, and 9,326 (15.5%) being black. Fifty nine percent of the registered voters are registered Democrats; 32% are Republicans; and 11% are not affiliated with either party. Of the black voters in Alamance County, approximately 94% are registered as Democrats, representing nearly 25% of the total registered Democrats.

There are thirteen townships in Alamance County, with a black majority in only one township, Pleasant Grove. In the Haw River Township, 40.2% of the citizens are black. In the other eleven townships, no more than 28.3% of the citizens are black. Approximately two-thirds of Alamance County's black population live in three townships - Burlington, Graham, and Haw River. Black citizens constitute a majority in only one of the eight incorporated municipalities in the county, Green Level, having a total population of 1,282. Of the 33 precincts in Alamance County, black citizens constitute a majority in two precincts, North Burlington and Pleasant Grove. In two

[2] All statistics that were provided to the court are included in this chart. The court does note that these statistics may not be complete; however, no other evidence is before the court to consider.

other precincts, Burlington #7 and Haw River, black citizens constitute 40% of the population.

Alamance County is divided into two school units, Burlington City School Unit and Alamance County School Unit. Approximately 60% of all registered voters live in the county school district, and 13.4% of these voters are black. There are five members of the Alamance County Board of Education who are elected in at-large elections for a term of four years. The terms are staggered with no more than three representatives elected at a time. Only voters that reside in the county school unit can vote for the county school board. In the past ten years, two black candidates have run for the Alamance County Board of Education. Saundra Dixon has been elected four times - in 1984 to serve two years of an unexpired term, again in 1986, 1990, and 1994. Anna M. Bass was first elected in 1994.

Other black candidates who have been elected in Alamance County include: David Maynard to the Burlington City Council in 1985, 1989, and 1993; Lawrence Slade to the Elon College Board of Alderman in 1991; and Sam Cousin to the Elon College Board of Alderman in 1987. In October 1993, the voter registration in the town of Elon College was 2,081, of whom 8% were black. On October 1, 1992, Plaintiffs filed a Complaint against the Board of Commissioners of Alamance County and the Alamance County Board of Elections, alleging violations of the Voting Rights Act[3] and the First,[4]

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[3] See infra p. 8.

[4] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

Thirteenth,[5] Fourteenth,[6] and Fifteenth[7] Amendments to the United States Constitution. The Alamance County Board of Commissioners and Board of Elections filed a motion to dismiss for lack of personal jurisdiction. Defendants consented to an amended complaint, naming the proper party defendant as Alamance County, North Carolina, including its Board of Commissioners and Board of Elections.

On May 16, 1994, Defendant Alamance County filed a motion for summary judgment. Plaintiffs do not resist summary judgment on their constitutional claims, and, accordingly, summary judgment will be granted as to the claims based on the First, Thirteenth, Fourteenth, and

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[5] Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. Const. Amend. XIII.

[6] Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

[7] Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

U.S. Const. amend. XV.

Fifteenth Amendments. Thus, only the claim under the Voting Rights Act remains for consideration.

II. DISCUSSION

Summary judgment is appropriate in those cases where it is established through pleadings, affidavits, depositions, and other discovery documents that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). Thus, it is the burden of the moving party to show the court that no material factual issues exist for trial. Of course, the court must draw any permissible inference from the underlying facts as established in the record in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538 (1986); Pulliam Inv. Co. v. Cameo Prop., 810 F.2d 1282, 1286 (4th Cir. 1987).

When the moving party has carried its burden, the nonmoving party must come forward with evidence which shows more than some "metaphysical doubt" that genuine and material factual issues exist. Matsushita, 475 U.S. at 586, 106 S. Ct. at 1356. A mere scintilla of evidence presented by the nonmoving party is insufficient to circumvent summary judgment. Anderson, 477 U.S. at 252, 106 S. Ct. at 2512. Rather, the nonmoving party must convince the court that upon the record taken as a whole a rational trier of fact could find for the nonmoving party. Id. at 248-49, 106 S. Ct. at 2510-11. More specifically, "the court can determine that a trial is unnecessary only if either the facts are undisputed, or if disputed, the dispute is of no consequence to the

dispositive question." Mitchell v. Data General Corp., 12 F.3d 1310, 1315-16 (4th Cir. 1993).

VOTING RIGHTS ACT

Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f) (2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1994).

Factors that may be considered probative of a section 2 violation include:

> 1. [T]he extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote or otherwise to participate in the democratic process;
>
> 2. [T]he extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. [T]he extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. [I]f there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. [T]he extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. [W]hether political campaigns have been characterized by overt or subtle racial appeals;

7. [T]he extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

(a) [W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

(b) [W]hether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Thornburg v. Gingles, 478 U.S. 30, 36-37, 106 S. Ct. 2752, 2759, 92 L. Ed. 2d 25 (1986) (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 28 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07) (letters added for ease of reference).

The leading case regarding a vote dilution claim through the use of multi-member districts is Gingles. In that case, the court held that the factors discussed above are relevant to a claim of three circumstances. First, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." Id. at 50, 106 S. Ct. at 2766. Second, "the minority group must be able to show that it is politically cohesive." Id. at 51, 106 S. Ct. at 2766. Third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it - in the absence of special circumstances, such as the

minority candidate running unopposed. . . . usually to defeat the minority's preferred candidate." Id. A section 2 claim does not require a showing of discriminatory intent, rather Congress eliminated any intent requirement with the 1982 amendments to section 2 of the Act that forbid any practice that "results in" discrimination. 42 U. S. C. § 1973(a); United States v. Marengo County Comm'n, 731 F. 2d 1546, 1563 (11th Cir.) (discussing the results test) , cert. denied and appeal dismissed, 469 U.S. 976, 105 S. Ct. 375, 83 L. Ed. 2d 311 (1984).

A. Compactness

William S. Cooper, Plaintiffs' redistricting consultant, is employed by the American Civil Liberties Union of Virginia, Inc. to review census maps and determine whether redistricting to include majority/minority districts is feasible. In this case, Cooper used GisPlus, a geographic information system, to develop a five district plan for the Alamance County Board of Commissioners. (Def.'s Evidentiary Submission Supp. Mot. Summ. J. Ex. 2 at Ex. D.) In the plan, District 1 is a majority-black district, with 53.5% black voting age population. Proposed District 1 covers an area of 14 square miles and a perimeter of 118 miles, containing 3% of the total land area of Alamance County. Defendant contends that a compact district would contain about 87 square miles and have a perimeter of 38 miles. This calculation is based on the division of Alamance County's 433 square miles into five equally compact election districts. Plaintiffs argue that equal land division is not tantamount to equal population, as required by the one person, one vote standard.

Over half of the black population in Alamance County live in District 1 (56.5%, 11,780 persons). District 1 engulfs areas in five townships, three municipalities,

fourteen precincts, and both school districts. However, District 1 can be modified to include only three townships and twelve precincts, while maintaining a black voting age population of 53.4%.

In his deposition, Cooper asserted that District 1 was compact because he could "run from one end to the other in two hours." (Def.'s Reply Br. Summ. J. Ex. 9 at 30-32.) Defendant contends that District 1 is, on its face, not compact because it has a contorted, irregular shape, and "reapportionment is one area in which appearances do matter." Shaw v. Reno, 113 S. Ct. 2816, 2827, 125 L. Ed. 2d 511, 529 (1993). However, neither party has produced any quantitative measure of compactness. There are three possible quantitative measures - dispersion, perimeter, and population. See Richard H. Pildes & Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno, 92 Mich. L. Rev. 483, 553-59 (1993). The dispersion technique "measures the ratio of the district area to the area of the minimum circumscribing circle" and symbolizes "how tightly packed or spread out the geography of a district is." Id. at 554 (quoting Richard G. Niemi et al., Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering, 52 J. Pol. 1155, 1160 (1990)). The perimeter technique "relates length of the district perimeter to the area the district includes" and measures "the extent to which district borders wander in irregular ways." Id. at 555. The population technique indicates the distribution of voters in a district. In this measure, the population of a district is compared to the population of nearby territory by utilizing a ratio where the district's population is the numerator, and a "rubber band" area around the district is the denominator. Id. at 557. The "rubber band" is "the area that would be inside a rubber band stretched tightly

around the district." Id. Another method involves using the population in the minimum circumscribing circle as the denominator. Id.

In the case at bar, although no quantitative measures have been produced, the evidence that has been presented concerning the compactness of the majority-black district is in dispute. The appearance of the district coupled with the other evidence produced by both parties establishes a question of material fact regarding the compactness of District 1. However, as a result of the findings hereafter, this dispute does not need to be resolved.

B. Racially Polarized Voting

The second and third elements of the Gingles test can be grouped together to determine the possible existence of racially polarized voting. Indeed, the "purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." Gingles, 478 U.S. at 56, 106 S. Ct. at 2769. "A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim." Id. "[A] white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." Id. A pattern of racial bloc voting is indicative of polarization, and the occasional success of a minority candidate does not necessarily establish the nonexistence of polarization. The success could be attributed to other factors, such as incumbency, no opposition, or bullet

voting.[8] Id. at 57, 106 S. Ct. at 2770. However, in some instances, the sustained success of black candidates will reflect the ability of the minority group to elect candidates of choice. Id. at 77, 106 S. Ct. at 2780.

In a vote dilution analysis, the courts are split on the issue of whether the race of the candidate is relevant. In Gingles, Justice Brennan, joined by Justices Blackmun, Marshall, and Stevens, stated that "only the race of the voter, not the race of the candidate, is relevant." Id. at 68, 106 S. Ct. at 2775. However, Justice White indicated that the race of a candidate could not be ignored. Id. at 83, 106 S. Ct. at 2783 (White, J., concurring). Justice O'Connor, who was joined by Chief Justice Burger and Justices Powell and Rehnquist, also rejected the position that "the race of the candidate is always irrelevant." Id. at 101, 106 S. Ct. at 2792 (O'Connor, J. , concurring in the judgment).

The lower courts, responding to this guidance, have quite expectedly developed different approaches to the consideration of the race of a candidate. Some courts have focused on the race of a candidate, while others have held that the race of a candidate is irrelevant to a claim of vote dilution. Compare Baird v. Consol.City of Indianapolis, 976 F.2d 357, 361-62 (7th Cir. 1992) (considering the race of a candidate by recognizing the election of a black Republican, although the majority of black voters were Democrats), cert. denied, 113 S. Ct. 2334, 124 L. Ed. 2d 246 (1993) with Carrollton Branch of the NAACP v. Stallings, 829 F.2d 1547, 1557 (11th Cir. 1987) (holding that "it is the status of the candidate as the chosen representative of a particular racial group, not the race of

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[8] Bullet voting occurs when voters vote for only one candidate to maximize the chances of that candidate winning the election. Thornburg v. Gingles, 478 U.S. 30, 39 n.5, 106 S. Ct. 2752, 2760 n.5, 92 L. Ed. 2d 25 (1986).

the candidate that is important"), cert. denied, 485 U.S. 936, 108 S. Ct. 1111, 99 L. Ed. 2d 272 (1988). Other courts have adopted a flexible approach, emphasizing two points: "(l) that not all minority candidates will be minority-preferred; and (2) that it is important to look beyond whether a white candidate received a majority of the minority community's vote and determine whether that white candidate is truly the minority community's representative of choice." Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1126 (3d Cir. 1993), cert. denied, 114 S. Ct. 2779, 129 L. Ed. 2d 891 (1994).

In addressing the determination of the minority's preferred candidates, the Court of Appeals for the Fourth Circuit has held that:

> The mere election of a candidate who appears to have received votes from more than fifty percent of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred by a significantly higher percentage of the minority community, who were defeated in the same election, then it cannot fairly be said that the minority community has successfully elected representatives of its choice. Each such situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community. The presumption must be that they cannot, if some other candidate has received significantly more minority votes.

Collins v. City of Norfolk, 883 F.2d 1232, 1238 (4th Cir. 1989), cert. denied, 498 U.S. 938, 111 S. Ct. 340, 112 L. Ed. 2d 305 (1990). This court will follow the Collins approach in determining the preferred candidates of the minority group.

In the case at bar, Byron D'Andre Orey, a graduate assistant researching electoral behavior at the State University of New York at Stoneybrook, prepared a statistical analysis of the voting behavior in Alamance County. In analyzing these statistics, the court will consider the percentage of black and white voters who cast votes for county commissioners.[9]

In the 1972 Democratic primary for county commissioner, there were three seats up for election, and the three candidates who received the highest percentage of votes by black voters who voted for county commissioner were, in descending order,[10] Morris,*[11] Long, and Fleming. The candidates who received the highest percentage of votes by white voters who voted for county commissioner were Horne, Fleming, and Long. The winners in the 1972 Democratic primary were Horne, Fleming, and Long.

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[9] In the charts provided to the court, the percentages utilized are in the columns labeled "Rollon by Blacks" and "Rollon by Whites."

This was the relevant percentage identified by Plaintiffs' expert. See attached Appendix. If the percentage of blacks/whites who voted is utilized [this percentage includes blacks/whites who voted in the relevant year, but did not vote for county commissioner], the results would be the same. The percentage of blacks/whites who voted is in the columns labeled "Votes by Blacks" and "Votes by Whites" in the Appendix.

[10] Throughout this analysis, candidates will be listed in descending order, i.e., the candidate who received the highest percentage of votes will be listed first.

[11] Asterisks will be used herein to indicate black candidates.

In the 1974 general election[12] for county commissioner, the three candidates who received the highest percentage of votes among black voters were O'Kelley,* Newlin, and Long. The candidates who received the highest percentage of votes among white voters were Danieley, Newlin, and Brady. O'Kelley,* Danieley, and Newlin won the election.

In the 1976 Democratic primary, there were three seats up for election; nowever, only two candidates received a significant number of votes by blacks -- O'Kelley* and Fleming. Fleming, Paris, and Moseley received the highest percentage of votes by whites. O'Kelley,* Fleming, and Paris won the primary election. In the 1976 general election, the candidates who received the highest percentage of votes by black and white voters were O'Kelley,* Fleming, and Paris, and these three candidates also won the election.

In the 1978 Democratic primary, there were two seats up for election. The two candidates who received the highest percentage of votes by black voters were Harris* and Newlin. There was a second black candidate, White,* who received the third highest percentage of votes by black voters who voted for county commissioner. The candidates who received the highest percentage among white voters were Newlin and Warren, and these two candidates won the primary election.

In the 1980 Democratic primary, O'Kelley,* Fleming, and Paris received the highest percentage of votes by blacks, and there was a black candidate, Howard,* who was fourth in rank and close behind Paris. O'Kelley,* Moser, and Paris were the winners and also received the

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[12] In the 1974 election, there were only two seats available; however, there was a separate election to fill an unexpired term.

highest percentage of votes by white voters. In the 1980 general election, O'Kelley,* Moser, and Paris received the highest percentage of votes among black voters, while Alcon, Crenshaw, and Rosencrans received the highest percentage of votes among white voters. O'Kelley,* Paris, and Alcon won the 1980 general election.

In the 1984 Democratic primary for county commissioner, Freeman,* Paris, and Thompson were the three candidates who received the highest percentage of votes by black voters. The candidates who received the highest percentage of votes by white voters were Holt, Thompson, Utley, and Freeman* (Utley and Freeman* tied at 35%). Holt, Thompson, and Freeman* won the 1984 primary. In the 1984 general election, the three candidates who received the highest percentage of votes by blacks voting for county commissioner were Freeman,* Thompson, and Holt. Allred, Alcon, and Barbour received the highest percentage of white votes and also won the election.

In the 1986 general election for county commissioner, Bennett and Morris* received the highest percentage of black votes, while Teague and Sharpe received the highest percentage of white votes. The two winners were Bennett and Teague. In the 1992 Democratic primary, Torain,* Scott, and Moorefield received the highest percentage of black votes. Scott, Moorefield, and Meredith received the highest percentage of white votes and won the primary election.

A thorough analysis of the statistics provided reveals several trends.[13] These statistics indicate that black voters

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[13] The success of black candidates running for positions other than county commissioner is not as probative of the existence of racial bloc voting as the statistics discussed herein, because these candidates were

usually vote for the same candidates. (Def's Evidentiary Submission Supp. Mot. Summ. J. Ex. 2 at Ex. 1-11.) Although Defendant contends that the Alamance County black community is divided into several factions, the overwhelming evidence indicates that the Alamance County black community is a cohesive group.

The only black citizen to be elected as a county commissioner is O'Kelley, who was first appointed. Although the success of a minority candidate may be discounted if the candidate is first appointed, in this case, O"Kelley has had continued success, winning three general elections -- 1974, 1976, and 1980. See Marengo, 731 F. 2d at 1572 (discussing the appointment of a minority candidate).

The black citizens who have lost in the Democratic primary include: W.I. Morris, Ron Harris, Frank White, Theodore Howard, and Ron Torain. Upon further analysis, it is clear that some of these candidates were not representatives of choice. Ron Harris and Frank White both lost in the 1978 Democratic primary when only two seats were up for election. The court does not consider White to be a preferred candidate because he received only 12% of the black vote, while Harris received 78% and Newlin[14] received 60%. In the 1980 Democratic primary, there were three seats available and three candidates received a higher percentage of votes by black voters than Howard, indicating that Howard was not a candidate of choice. In 1984, J.A. Freeman, a black citizen, won the Democratic primary and

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not elected in at-large elections. Defendant asserts that Saundra Dixon and Anna M. Bass were elected to the county school board in at-large elections. However, only voters that reside in the county school unit can vote for the county school board. The proposed District I includes both school districts and, therefore, includes voters ineligible to participate in the county school board elections.

[14] Newlin was one of the winners in the 1978 Democratic primary.

lost in the general election. In 1986, W.I. Morris was nominated without a primary. In the general election, there were two seats available, and Morris received 57% of the vote, while Bennett, one of the two winners in the election, received 99% of the votes by black voters, indicating that Morris was not the most preferred candidate.

Black voters have had some success electing preferred white candidates. Several white candidates with 99% of the votes by black citizens have won the general election for county commissioner including: Newlin, Fleming, Paris, and Bennett. White candidates with 99% of the votes by black citizens who have lost the general election include Long and Moser. The two white candidates with a high percentage of votes among black voters that have won the Democratic primary are Long and Newlin. However, Newlin won with 60% of the black vote, while Harris lost with 78% of the black vote and consistent with the Fourth Circuit's analysis in Collins, Newlin may not be considered a preferred candidate. Collins, 883 F.2d at 1238 (stating that "the critical fact is the difference between the black support for the candidate who received the most black votes yet lost and for the candidates who won with fewer black votes"). The same analysis applies with respect to Long who received 85% of the black vote, while Morris, who lost in the primary, received 98% of the vote.

In reviewing these statistics, it becomes apparent that Plaintiffs' claim of vote dilution must fail. In addition to the sustained success of O'Kelley, Plaintiffs' expert identified 31 candidates who were "generally preferred" by black voters, and 20 of the 31 candidates have won their election or nomination.[15] (Def.'s Evidentiary Submission

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[15] The court's analysis utilizes the Collins approach and, as such, is more restrictive than the Plaintiffs' expert's analysis in defining

Supp. Mot. Sumn. J. Ex. 8 at 59-73.) Plaintiffs' expert also stated that 13 of the 22 "strongly preferred" candidates have won their election or nomination, and 11 of the 17 "strongest preferred candidates" have won their election or nomination. (Def.'s Evidentiary Submission Supp. Mot. Summ. J. Ex. 8 at 78-88.) If only general elections for commissioners are analyzed, 8 of the 11 "strongest preferred candidates" identified by Plaintiffs' expert were elected. (Def.'s Evidentiary Submission Supp. Mot. Summ. J. Ex. 8 at 85-88.)

After reviewing the entire record, the court finds that the evidence fails to support Plaintiffs' contention that the minority group's preferred candidates are usually defeated by bloc voting among white voters of Alamance County. Accordingly, Defendant's Motion for Summary Judgment will be granted.

III. CONCLUSION

For the reasons discussed herein, Defendant's uncontested motion for summary judgment as to the claims based on the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution will be granted, and Defendant's contested motion for summary judgment as to the claim for violation of the Voting Rights Act will be granted.

An order in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 6th day of April, 1995.

/s/

United States District Judge

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candidates of choice. In utilizing the Collins approach, the results do not significantly differ from the results of Plaintiffs' expert.

APPENDIX

1972 Democratic Primary
For County Commissioner
(3 Seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Long W	.71	.84	.36	.42
Small	.05	.08	.11	.13
Tate	.08	.09	.32	.37
Fleming W	.25	.29	.45	.51
Horne W	.14	.16	.46	.53
Johnson	.04	.05	.30	.35
Morris*	.83	.98	.13	.16
R^2 = .79				

* = Black Candidate
W = Winner

Votes by Blacks/Whites (columns 1 and 3) represent all black/white voters who voted. Rollon by Blacks/Whites (columns 2 and 4) represent only those black/white voters who voted for county commissioner.

1974 General Election
For County Commissioner
(2 Seats)
(1 Seat Vacancy)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Long, J.B. (D)	.99+	.99+	.32	.35
Newlin, H. (D) W	.99+	.99+	.42	.47
Brady (R)	0	0	.38	.44
Danieley (R) W	0	0	.46	.52
Shoffner (R)	0	0	.38	.43
O'Kelley* (D) W	.99+	.99+	.36	.40
R^2 = .44				

* = Black Candidate
W = Winner
D = Democrat
R = Republican

Shoffner and O'Kelley were the two candidates for the vacant seat. Long, Newlin, Brady, and Danieley were the candidates for the two seats.

1976 Democratic Primary
for County Commissioner
(3 Seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Andrews	.07	.10	.36	.42
Fleming W	.33	.47	.45	.52
Moseley	.11	.16	.39	.45
Paris W	.11	.16	.41	.48
Thomas	.05	.07	.18	.21
O'Kelley* W	.79	.99+	.38	.44
$R^2 = .84$				

* = Black Candidate
W = Winner

1976 General Election
for County Commissioner
(3 Seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Fleming (D) W	.99+	.99+	.52	.55
O'Kelley* (D) W	.99+	.99+	.52	.55
Paris (D) W	.99+	.99+	.51	.54
Alcon (R)	0	0	.41	.43
Campbell (R)	0	0	.35	.37
Teague (R)	0	0	.38	.40
R^2 = .57				

* = Black Candidate
W = Winner
D = Democrat
R = Republican

1978 Democratic Primary
for County Commissioner
(2 Seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Newlin W	.44	.60	.54	.67
Rogers	.06	.08	.18	.22
Warren W	.05	.07	.45	.56
White*	.09	.12	.09	.11
Harris*	.58	.78	.17	.21
R^2 = .79				

* = Black Candidate
W = Winner

1980 Democratic Primary
for County Commissioner
(3 Seats)

Candidate		Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Fleming		.50	.57	.30	.37
McLean		.02	.02	.31	.38
Moser	W	0	0	.36	.44
Paris	W	.42	.48	.36	.44
Howard*		.37	.42	.14	.18
O'Kelley*	W	.99+	.99+	.36	.44
R^2 = .77					

* = Black Candidate
W = Winner

1980 General Election
for County Commissioner
(3 Seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Moser (D)	.93	.99+	.36	.38
Paris (D) W	.98	.99+	.37	.39
Alcon (R) W	0	0	.58	.62
Crenshaw (R)	0	0	.51	.54
Rosencrans (R)	0	0	.42	.45
O'Kelley* (D) W	.97	.99+	.41	.44
R^2 = .76				

* = Black Candidate
W = Winner
D = Democrat
R = Republican

1984 Democratic Primary
for County Commissioner
(3 Seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Bason	.09	.11	.21	.27
Ham	.06	.08	.13	.17
Utley	0	0	.27	.35
Holt W	.15	.19	.30	.39
Paris	.40	.50	.24	.31
Thompson W	.32	.40	.28	.36
Freeman* W	.78	.98	.27	.35
$R^2 = .73$				

* = Black Candidate
W = Winner

1984 General Election
for County Commissioner
(3 Seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Holt (D)	.60	.69	.32	.36
Thompson (D)	.75	.86	.25	.28
Alcon (R) W	.03	.03	.50	.57
Allred (R) W	0	0	.56	.64
Barbour (R) W	0	0	.45	.51
Freeman* (D)	.83	.95	.21	.24
R^2 = .91				

* = Black Candidate
W = Winner
D = Democrat
R = Republican

1986 General Election
for County Commissioner
(2 Seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Bennett (D) W	.86	.99+	.40	.46
Sharpe (R)	0	0	.53	.60
Teague (R) W	0	0	.55	.63
Morris* (D)	.40	.57	.17	.19
R^2 = .67				

* = Black Candidate
W = Winner
D = Democrat
R = Republican

1992 Democratic Primary
for County Commissioner
(3 Seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Booth	.15	.19	.11	.15
Ingle	.18	.22	.20	.28
Meredith W	.20	.25	.20	.28
Moorefield W	.27	.33	.29	.40
Scott W	.38	.47	.33	.46
Walters	.09	.11	.14	.19
Torain*	.60	.74	.06	.08
$R^2 = .89$				

* = Black Candidate
W = Winner

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ERNESTINE LEWIS, SYLVESTER J. LEWIS, and MINNETTA E. HILL,	)	
Plaintiffs,	)	
v.	)	2:92CV00614
ALAMANCE COUNTY, NORTH CAROLINA, including its BOARD OF COMMISSIONERS AND BOARD OF ELECTIONS,	)	
Defendant.	)	

JUDGMENT

OSTEEN, District Judge

For the reasons set forth in the memorandum opinion entered contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' Request for Oral Argument on Defendant's Motion for Summary Judgment is denied.

This the 6th day of April, 1995.

/s/
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ERNESTINE LEWIS;	)	
SYLVESTER J. LEWIS,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
and	)	
	)	
MINETTA E. HILL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 95-2002**
	)	
ALAMANCE COUNTY, NORTH CAROLINA, including its Board of Commissioners and Board of Elections,	)	
	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Middle District of North Carolina, at Greensboro.
William L. Osteen, Sr., District Judge.
(CA-92-614)

Argued: March 5, 1996

Decided: November 4, 1996

Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges.

Affirmed by published opinion. Judge Luttig wrote the majority opinion, in which Chief Judge Wilkinson joined. Chief Judge Wilkinson wrote a concurring opinion. Judge MICHAEL wrote a dissenting opinion.

COUNSEL

ARGUED: Donnell Van Noppen III, PATTERSON, HARKAVY & LAWRENCE, Raleigh, North Carolina, for Appellants. J. Michael Crowell, THARRINGTON, SMITH, Raleigh, North Carolina, for Appellees. **ON BRIEF:** E. Hardy Lewis, THARRINGTON, SMITH, Raleigh, North Carolina; S.C. Kitchen, Alamance County Attorney, Graham, North Carolina, for Appellees.

OPINION

LUTTIG, Circuit Judge:

Appellants Ernestine and Sylvester Lewis, black voters of appellee Alamance County, North Carolina, challenged the County's at-large method of electing county commissioners, arguing that black citizens have been denied an equal opportunity to elect representatives of their choice through vote dilution, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The district court granted summary judgment for the County, holding that plaintiffs failed to demonstrate that minority-preferred candidates are usually defeated by white bloc voting, as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986). For the reasons that follow, we affirm.

I.

Alamance County is governed by a Board of Commissioners, the five members of which are elected, in at-large partisan elections, to four-year staggered terms. Voters are allowed to cast votes for as many candidates as there are vacant seats, but they cannot cast more than one vote for any one candidate. Since the 1965 passage of the Voting Rights Act, black candidates have run for seats on the Board in eight of fourteen election cycles. Only one black candidate, Jack O'Kelley, has been elected, although he was elected three times, in 1974 (after first being appointed to fill a vacancy), 1976, and 1980. Moreover, white candidates supported by a majority (often substantial) of black voters, either in the primary election, the general election, or both, have repeatedly won election.[1]

Section 2(a) of the Voting Rights Act of 1965 prohibits a State or its political subdivisions from imposing any voting practice "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Section 2(b) of the Act, as amended in 1982, further provides that a violation of § 2(a) occurs,

> if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation

[1] The census data of 1990 shows that Alamance County's population is 79.8% white, 19.2% black. Voting age population is 81.2% white, 18.0% black. As of April 1994, the population of registered voters was 84.1% white, 15.5% black. While 59% of all registered voters in the county are Democrats, blacks in Alamance County are overwhelmingly Democrats (94%). For this latter reason, when we refer to primary elections, we are referring only to the Democratic primaries.

> by members of a class of citizens protected by subsection (a) of this section in that its members have *less opportunity* than other members of the electorate to participate in the political process and *to elect representatives of their choice.*

42 U.S.C. § 1973(b) (emphasis added).[2]

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court interpreted the amended Voting Rights Act as it applied to a challenge to multi-member districts in which candidates were elected at large. Rejecting the claim that an at-large election scheme is *per se* violative of the Voting Rights Act, *id.* at 48, 106 S.Ct. at 2765, the Court established three preconditions to proving that such a voting system dilutes minority group voting strength sufficiently to violate the Act:

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[2] The full statute provides as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . .
>
> Second, the minority group must be able to show that it is politically cohesive. . . .
>
> Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

478 U.S. at 50-51. If these preconditions are met, the court must then determine under the "totality of circumstances" whether there has been a violation of Section 2. *See Johnson v. De Grandy*, 114 S.Ct. 2647, 2657 (1994); *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 938 (4th Cir. 1987) (*"Collins I"*) ("[The] ultimate determination [of vote dilution under the Voting Rights Act] still must be made on the basis of the 'totality of the circumstances.'").

In an effort to meet *Gingles'* second and third preconditions, plaintiffs' expert in this case conducted bivariate ecological regression analyses on the eleven primary and general elections in which a black candidate was on the ballot. Based on those regression analyses, the expert estimated the level of support among black voters for each candidate.[3] Plaintiffs then proffered the voter

[3] In the face of the County's intended challenge to the use of such statistical evidence, we again caution against overreliance on bivariate ecological regression analysis in the estimation of voter preferences for purposes of a vote dilution claim. *See, e.g., Smith v. Brunswick County, Va., Bd. of Supervisors*, 984 F.2d 1393, 1400 n. 6 (4th Cir. 1993). Bivariate regression analysis, as used in Voting Rights Act cases, only allows one to determine the correlation between the

preference estimates as proof of both black voter cohesion (the second *Gingles* element) and white bloc voting sufficient to usually defeat black-preferred candidates (the third *Gingles* element). After reviewing the voter preference estimates from plaintiffs' expert on these selected elections, the district court held that plaintiffs had failed to provide evidence sufficient to satisfy the third *Gingles* element, because they had not shown that black-preferred

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percentage of the vote received by a particular candidate and the racial composition of voting precincts. *See, e.g., Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1119 n. 10 (3d Cir. 1993) (citing Richard L. Engstrom & Michael D. McDonald, *Qualitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 *URB. LAW.* 369, 374 (Summer 1985)), *cert. denied*, 114 S.Ct. 2779 (1994); *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1556 (11th Cir. 1987), *cert. denied*, 485 U.S. 936 (1988). The relevant correlation for vote dilution claims, however, is that between the race of the voters and the votes cast for a particular candidate, not that between the racial composition of precincts and the votes cast for a particular candidate, for it is only the former from which one can accurately estimate actual voter preferences. One can derive estimates of voter preferences from the regressions employed here only by *assuming* that the level of minority support for the candidate is fairly constant across precincts--an "ecological" assumption that runs counter to the common sense observation that blacks and whites who live in integrated neighborhoods are more likely to vote for candidates of another race. *See, e.g.*, Bernard Grofman et al., *Minority Representation and the Quest for Voting Equality* 89 (1992) ("The principal disadvantage [of ecological regression is] the possibility of errors owing to ecological inference."); *id.* ("[T]he 'ecological fallacy' . . . is the error of attributing the average behavior of voters in a given geographic area (ecological unit) to all voters in that area."). In other words, the bivariate ecological regression analysis merely *assumes* that which it is the purpose of the analysis to *prove*--political cohesiveness and constancy of candidate preference among minority voters and racial bloc voting among majority voters. *See Overton v. City of Austin*, 871 F.2d 529, 539 n. 12 (5th Cir.1989) ("[Bivariate ecological regression analysis] assumes that the voters in most precincts voted according to their ethnicity."); *id.* at 539 ("[T]rial court should not ignore the imperfections of the data used nor the limitations of [bivariate ecological regression] analysis").

candidates were usually defeated. Based upon the limited data before the court, this conclusion was fully supported even by plaintiffs' own expert witness, who admitted during his deposition that twenty of the thirty-one candidates "generally preferred" by black voters in the select number of elections he analyzed won election or nomination, thirteen of twenty-two "strongly preferred" candidates won election or nomination, and eleven of the seventeen "strongest preferred" candidates won election or nomination. If only the five general elections analyzed by plaintiffs' expert are considered, eight of the eleven candidates most strongly preferred by black voters were elected to seats on the Board.

Plaintiffs advance on appeal four arguments as to why the district court's conclusion was in error. We reject plaintiffs' claim that those white candidates who received overwhelming support from black voters in general elections, assertedly only because they were Democrats, should not have been considered as black-preferred candidates by the district court. And we also reject plaintiffs' argument that the district court erred in not discounting the repeated success of one of the minority-preferred candidates because of the alleged effects of incumbency. We agree with plaintiffs, however, that the district court improperly aggregated primary and general election results, and also that it failed to conduct an individualized determination into whether some candidates should be treated as black-preferred candidates. Additionally, we conclude that the district court erred in a third respect, by basing its decision exclusively on data from elections in which a black candidate was on the ballot, rather than on a more representative sample of elections. By limiting its consideration to elections in which a candidate of the minority's race was on the ballot, the district court may have failed to include as black-preferred

candidates some white candidates who may very well have been the representatives of choice of the black community.

II.

Turning first to what we perceive to be the overarching error, we believe that, by considering only elections in which a black candidate was on the ballot, the district court failed to analyze a sufficient number of elections to enable it to determine whether white bloc voting usually operates to defeat minority-preferred candidates. As noted, the district court considered only election data from eleven of the twenty-eight primary and general elections held since passage of the Voting Rights Act--six of fourteen primary elections and only five of fourteen general elections. Although we recognize that this election data was the only data proffered by plaintiffs, we believe that, without a larger, more representative sample of elections, the district court simply did not have before it sufficient evidence to determine whether the black-preferred candidates *usually* were defeated,[4] unless one is willing to assume (which we

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[4] We do not imply that the third *Gingles* element is met if plaintiffs merely show that white bloc voting defeats the minority-preferred candidate more often than not. The terms used by the *Gingles* Court are "usually," "normally," and "generally." 478 U.S. at 49, 51, 56. We need not in this case specify a meaning for these terms; suffice it to say that they mean something more than just 51%. *See Clarke v. City of Cincinnati*, 40 F.3d 807, 812-13 (6th Cir. 1994) (finding that 47% success rate was "no reason to find that blacks' preferred black candidates have 'usually' been defeated."), *cert. denied*, 115 S.Ct. 1960 (1995); *Uno v. City of Holyoke*, 72 F.3d 973, 985 (1st Cir.1995) ("[T]o be legally significant, racially polarized voting in a specific community must be such that, over a period of years, whites vote sufficiently as a bloc to defeat minority [-preferred] candidates *most of the time.*" (emphasis added)). Indeed, Justice O'Connor suggested in *Gingles* that a finding of "usually defeated" should be based on a success rate by minority-preferred candidates that is less than proportional representation, although greater than mere tokenism. 478 U.S. at 99-

are not) that the black community will never have a preferred candidate in an election in which no black candidate is on the ballot, or, more fundamentally, that a black voter can never prefer a candidate who is white.

Although the district court erred in this regard, we do not reverse its judgment because of this error, for it is the plaintiffs' burden to establish a violation of Section 2, and therefore their burden to proffer data from a sufficient number of elections to enable the district court to determine whether white bloc voting usually defeats minority-preferred candidates. Where, as here, plaintiffs fail to carry their burden to proffer sufficient evidence, and the district court correctly concludes on the basis of the proffered evidence that no Section 2 violation has been established, then the plaintiffs cannot be heard to complain.

A.

Section 2 of the Voting Rights Act prohibits the use of voting procedures, such as at-large elections, that afford minority voters less opportunity than other members of the electorate "to elect *representatives of their choice*," 42 U.S.C. § 1973(b) (emphasis added), or, in the language of *Gingles*, that afford minority voters less opportunity to elect

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100 (O'Connor, J., concurring in judgment) ("[A] reviewing court should be required to find more than simply that the minority group does not usually attain an undiluted [that is, proportional] measure of electoral success. The court must find that even substantial [that is, less than proportional but more than token] minority success will be highly infrequent under the challenged plan before it may conclude, on this basis alone, that the plan operates 'to cancel out or minimize the voting strength of [the] racial grou[p].'" (quoting *White v. Regester*, 412 U.S. 755, 765 (1973))); *see also Jenkins*, 4 F.3d at 1122 ("If minority-preferred candidates are consistently able to prevail *in representative numbers* . . ., then it cannot be said that white voters vote sufficiently as a bloc usually to prevent the election of the minority preferred candidates." (emphasis added)).

minority-preferred candidates. *Gingles*, 478 U.S. at 51. The only possible interpretation of this unambiguous language is that Section 2 prohibits any election procedure which operates to deny to minorities an equal opportunity to elect those candidates whom they prefer, *whether or not those candidates are themselves of the minority race*. As Justice Brennan observed in *Gingles*, "it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate," which is relevant in determining whether *Gingles'* third precondition is satisfied. *Gingles*, 478 U.S. at 68, 106 S.Ct. at 2775 (plurality opinion of Brennan, J., joined by Blackmun, Marshall, and Stevens, JJ.); *see Collins I*, 816 F.2d at 937 n. 5 ("The question is not . . . so simple as how many blacks versus whites were elected. The court must examine the parties' studies of voting preferences to determine which were the preferred candidates of the majority and minority communities."); *see also* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1103 n. 115 (1991) ("Authentic representatives [of the black community] need not be black as long as the source of their authority, legitimacy, and power base is the black community."). That is, a minority-preferred candidate may be a non-minority, just as a minority candidate may be the preferred candidate of the voters of the majority's race. The black community may prefer a white candidate, as the white community may prefer a black candidate. A Martin Luther King, Jr. or a Colin Powell can represent white Americans, no less than a John Fitzgerald Kennedy or a Hubert Humphrey can represent black Americans. To indulge the contrary presumption, that every black person necessarily prefers a black candidate over a white candidate, or that every white person necessarily prefers a white candidate over a black candidate, would itself constitute invidious discrimination of the kind that the Voting Rights Act was

enacted to eradicate, effectively disenfranchising every minority citizen who casts his or her vote for a non-minority candidate. To acquiesce in such a presumption would be not merely to resign ourselves to, but to place the imprimatur of law behind, a segregated political system--in Judge Cabranes' words, an "electoral apartheid," *NAACP v. City of Niagara Falls, N.Y.*, 65 F.3d 1002, 1016 (2d Cir. 1995)--in derogation of the most fundamental principles of our representative democracy and in betrayal of our most cherished beliefs about individual autonomy and political self-determination.

Our understanding of Section 2 that the minority-preferred candidate may be either a minority or a non-minority, and therefore that both elections in which the candidates are of the same race and elections in which the candidates are of different races must be considered in order to determine whether white bloc voting usually defeats the minority-preferred candidate, is confirmed within Section 2 itself, by the express proviso that "[t]he extent to which members of a protected class have been elected to office" is but "one circumstance which may be considered" in assessing whether minority voters have been denied an equal opportunity "to participate in the political process and to elect representatives of their choice." *See* 42 U.S.C. § 1973(b); *see also id.* ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."). Were this proviso, coupled with the statute's plain reference to the minority's representatives "of choice," not enough, the plurality in *Gingles* itself, as noted, expressly stated that "*only* the race of the voter, not the race of the candidate, is relevant" in determining whether a plaintiff has met *Gingles'* preconditions, *Gingles*, 478 U.S. at 68 (emphasis added), and not a single Justice suggested that only candidates of the minority race could be considered

minority-preferred candidates, *see infra* note 5. Indeed, as the Third Circuit has held, a candidate of the minority's race need not even be the minority-preferred candidate. *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1126 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 2779 (1994).

Although at times they suggest otherwise, *see* Appellant's Br. at 30 ("Under the law, black voters must have an opportunity not just to elect candidates of their choice, but to elect *black* candidates of their choice"), plaintiffs no doubt agree with our interpretation of Section 2. They themselves conducted a bivariate regression analysis on the eleven elections in which a black candidate was on the ballot precisely in order to determine whether the black candidate or the white candidate was the minority-preferred candidate in those elections. Had they not believed, as we do, that a white candidate may be the minority-preferred candidate, then they would have advanced their claim solely on the basis that only one black candidate had actually won in these elections. To conduct a regression analysis with respect to a black-white election, ostensibly in part to identify the black-preferred candidate, makes sense only if it is possible for the preferred candidate not to be the black candidate.

We recognize that the plaintiffs' expert in *Gingles* had only analyzed elections in which a black candidate had appeared on the ballot, *see Gingles*, 478 U.S. at 52, 106 S.Ct. at 2767, and that the Court there relied upon that data in invalidating North Carolina's at-large election scheme. The Court in *Gingles*, however, never addressed the question of whether plaintiffs' exclusion of evidence from white-white races rendered their proffer insufficient; it merely assumed for purposes of that case that the black candidates there were the representatives of choice of black

voters. Justice Brennan, in fact, could not have been clearer in this regard:

> Because both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites. . . . Indeed, the facts of this case illustrate that tendency--blacks preferred black candidates, whites preferred white candidates. *Thus, as a matter of convenience, we and the District Court may refer to the preferred representative of black voters as the "black candidate" and to the preferred representative of white voters as the "white candidate." Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. Under § 2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important.*

Id. at 68, 106 S.Ct. at 2775 (emphasis added, in part) (plurality opinion);[5] *cf. Harvell v. Blytheville School District No. 5*, 71 F.3d 1382, 1386 (8th Cir. 1995) (*en*

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[5] Although Justice White, who joined the remainder of Justice Brennan's opinion, did not join this portion of the opinion, neither Justice White nor Justice O'Connor, who concurred only in the judgment, as much as hinted that only elections in which a black candidate was on the ballot need be considered; they each merely argued that Justice Brennan's conclusion that the race of the candidate is always irrelevant was in conflict with *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and was not necessary to the disposition of the case. *Id.* at 82, 83, 106 S.Ct. at 2783, 2783 (White, J., concurring); *id.* at 83, 101, 106 S.Ct. at 2783, 2792-93 (O'Connor, J., concurring in the judgment, joined by Burger, C.J., and Powell and Rehnquist, JJ.).

banc) ("We do not categorically state that a candidate is the minority-preferred candidate simply because that candidate is a member of the minority. Such stereotyping runs afoul of the principles embodied in the Equal Protection Clause." (citing *Miller v. Johnson*, 115 S.Ct. 2475, 2486 (1995))), *cert. denied*, 116 S.Ct. 1876 (1996).

Where the results of not even a majority, much less a substantial majority, of elections are considered, it is simply not possible for the district court to determine whether minority-preferred candidates are "usually" defeated. We therefore hold that, in assessing whether "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," a district court must consider, at a minimum, a representative cross-section of elections, and not merely those in which a minority candidate appeared on the ballot, at least where elections in which minorities were on the ballot do not constitute a substantial majority of the total number of elections. *Cf. Niagara Falls*, 65 F.3d at 1016-17 ("The trial court . . . properly attempted to analyze white-white elections, as well as to evaluate the success of white candidates in black-white elections, to determine whether whites voted as a bloc to defeat blacks' preferred candidates."). Only by considering such a representative sample can the district court meaningfully determine whether a white voting bloc usually defeats the minority-preferred candidate. *See, e.g., Uno v. City of Holyoke*, 72 F.3d 973, 985 (1st Cir. 1995) ("[T]o be legally significant, racially polarized voting in a specific community must be such that, over a period of years, whites vote sufficiently as a bloc to defeat minority[-preferred][6] candidates most of the time. . . . In order

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[6] Although the First Circuit referred in this passage to "minority candidates," not to "minority-preferred candidates," it is evident from its citation to *Gingles* at p. 56, 106 S.Ct. at 2769 that the court meant by "minority candidate" the "minority-preferred candidate." At that

reliably to tell whether racial groups do (or do not) band together behind particular candidates with regularity, *all elections in the relevant time frame (or, at least, a representative sampling of them) must be studied*--not just those elections that, taken in isolation, reveal the cicatrices of racially polarized voting." (emphasis added)). By focusing exclusively on elections in which a minority candidate appeared on the ballot, it can only be determined whether the "minority candidate" is usually defeated, not, as required by Section 2, whether the "minority-preferred candidate" is usually defeated. *See, e.g., Harvell*, 71 F.3d at 1393 n. 2.

Our sister circuits interpret section 2 and the third *Gingles* element as do we. As the Tenth Circuit recognized in affirming a district court's finding that plaintiffs' evidence was "inadequate" to measure the success of minority-preferred candidates because it did not consider elections in which only whites were on the ballot:

> [A] per se rule against examining races that have only white candidates . . . would be clearly contrary to the [Gingles] plurality opinion, which views the race of the candidates as irrelevant in voting analysis [and] . . . is questionable in light of the language of § 2, which seeks to give minorities equal opportunity to "elect representatives *of their choice*."

Sanchez v. Bond, 875 F.2d 1488, 1495 (10th Cir. 1989), *cert. denied*, 498 U.S. 937 (1990); *SCLC v. Sessions*, 56 F.3d 1281, 1293-94 (11th Cir. 1995) (*en banc*) (approving district court's conclusion that the analysis by plaintiff's

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page in *Gingles*, the Supreme Court refers only to the "minority's preferred candidates" and the "representatives of their choice." It does not once refer to minority candidates.

expert "was flawed because he only analyzed elections . . . involving a black candidate."), *cert. denied*, 116 S.Ct. 704 (1996); *see also Uno*, 72 F.3d at 988 n. 8 ("[T]he VRA does not require for a successful section 2 showing that minority-preferred candidates be members of the minority group. . . ."); *Niagara Falls*, 65 F.3d at 1016 (district court properly analyzed white-white elections to determine which candidates were black-preferred); *Clarke v. City of Cincinnati*, 40 F.3d 807, 810 n. 1 (6th Cir. 1994) ("Plaintiffs suggest that white candidates cannot be included among blacks' preferred candidates, but we disagree." (quotation marks omitted)), *cert. denied*, 115 S.Ct. 1960 (1995); *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (*en banc*) ("[W]e do not foreclose the consideration of electoral races involving only white candidates where the record indicates that one of the candidates was strongly preferred by black voters."), *cert. denied*, 115 S.Ct. 1795 (1995); *Jenkins*, 4 F.3d at 1125 ("[T]here may be majority candidates who truly may be the minority community's representative of choice."); *Valladolid v. City of National City*, 976 F.2d 1293, 1297 (9th Cir. 1992) ("[Appellants' argument] that minorities have long been underrepresented on the city council, and that a significant number of minority candidates have failed in their efforts to win election to that body . . . too easily equate[s] the presence or absence of minority individuals on the council with the victory or defeat of minority-preferred candidates.").[7]

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[7] *See also Smith v. Clinton*, 687 F. Supp. 1310, 1316 (E.D. Ark. 1988) (three-judge panel) ("We assume without deciding that all of the evidence [of white-white elections] offered by the defendants is admissible and properly to be considered."); *Brown v. Board of Commissioners of the City of Chattanooga*, 722 F. Supp. 380, 391 (E.D. Tenn. 1989) ("[A] review of white/white elections as well as white/black elections is necessary to determine the existence of racially polarized voting."); *Southern Christian Leadership Conference of Alabama v. Evans*, 785 F. Supp. 1469, 1473 (M.D. Ala. 1992) ("Court will . . . consider political races generally--white on black and white on

The Fifth Circuit in *Citizens for a Better Gretna v. City of Gretna*, La., 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989), agreed that "*Gingles* is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter," *id.* at 503, and it even noted that "Justice Brennan's plurality opinion is careful not to state that a black candidate is tantamount to the black preference." *Id.* But, it found "implicit" in *Gingles'* undiscussed reliance on data only from black-white elections "the notion that black preference is determined from elections which offer the choice of a black candidate," and thus concluded that the race of the candidate was less significant than that of the voters "only within the context of an election that offers voters the choice of supporting a viable minority candidate." *Id.* at 503-04; *see also id.* at 504 ("The various *Gingles* concurring and dissenting opinions do not consider evidence of elections in which only whites were candidates. Hence, neither do we."); *Campos v. City of Baytown*, Tex., 840 F.2d 1240, 1244 (5th Cir. 1988) ("The district court was warranted in its focus on those races that had a minority member as a candidate." (citing *Gretna*, 834 F.2d at 503)), *cert. denied*, 492 U.S. 905 (1989). However, the Fifth Circuit has, since, substantially retreated from its *dictum* in *Gretna* in *Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989), holding that it is, indeed, permissible to consider elections in which a minority is not on the ballot. *Id.* at 538 (relying only on elections in which a minority was on the ballot and on election results rather than extrinsic factors "is not the only permissible way to approach § 2 claims."); *cf.*

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white--in seeking to determine the question of whether the political process is open to minority voters. The Court must keep in mind the mandate of the statute that Section 2 does not require that minorities be given equal opportunity to elect minority candidates, but that they be given equal opportunity to 'elect representatives of their choice.'").

LULAC v. Clements, 986 F.2d 728, 748 (5th Cir.) ("[A] court may properly give more weight to elections in which the minority-preferred candidate is a member of the minority group."), *on reh'g en banc*, 999 F.2d 831, 864 (1993) ("This court has consistently held that elections between white candidates are *generally* less probative in examining the success of minority-preferred candidates . . . ." (emphasis added) (citing *Campos*, 840 F.2d at 1245; *Gretna*, 834 F.2d at 503)), *cert. denied*, 114 S.Ct. 878 (1994).

In short, though some courts have held that black-white elections are more probative than white-white elections, *see, e.g., Uno*, 72 F.3d at 988 n. 8; *Jenkins*, 4 F.3d at 1128; *LULAC*, 999 F.2d at 864; *Smith*, 687 F. Supp. at 1316,[8] to our knowledge, no court has held that a white candidate cannot, as a matter of law, be a minority-preferred candidate, and therefore that white-white elections are irrelevant to the *Gingles* third element inquiry.

B.

By failing to consider evidence of elections in which no minority candidate appeared on the ballot, the district court, insofar as can be discerned, could have understated (or

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[8] We do not decide here the extent to which, if any, white-white elections are deserving of less evidentiary weight than elections in which a minority candidate is on the ballot. It seems to us, however, that if white-white elections are entitled to less weight, then they are so only on the question of whether racial polarization exists, not on the question of whether, because of that polarization, minority-preferred candidates are *usually* defeated. *Cf. Harvell*, 71 F.3d at 1382 (distinguishing between "racial cohesiveness," the second *Gingles* precondition, and "racial polarization, . . . the essential element of the third *Gingles* precondition," and holding that in measuring whether racial polarization "permits the majority usually to defeat the minority's preferred candidates," evidence such as "elections in which there was no African-American candidate [on the ballot] . . . become[s] relevant.").

overstated) the extent to which minority-preferred candidates were usually defeated in Alamance County.

For example, the record includes election data from the 1974 general election because O'Kelley, a black candidate, was on the ballot seeking election to the unexpired term of the seat to which he had been appointed following a vacancy. But it does not include election data from the 1974 primary election, notwithstanding that the two Democrats elected in the primary for the two full-term seats, both of whom were white, each received 99+% of the black vote in the general election. Although it may well be that either or both of these candidates were the minority-preferred candidates in the 1974 primary, and therefore would have counted as minority-preferred electoral successes (both did receive a majority of black support in *other* primary elections--Long received 84% in 1972, and Newlin 60%, in 1978), it could be that neither was a minority-preferred candidate in the 1974 primary, in which case there were uncounted minority-preferred defeats.

Similarly, the record does not include election results from the 1972 or 1978 general elections, although Long was successful in the 1972 primary with 84% of the black vote (second only to the 98% received by Morris, a black candidate), and Newlin was successful in the 1978 primary with 60% of the black vote (second only to the 78% received by black candidate Harris). Based upon the record data from other general elections, it may be that both of these candidates received near unanimous support of the black community in their general elections, and thus should have been considered the black-preferred candidates in those elections. But, without the data from these elections, it simply cannot be known whether they, or others, were the black-preferred candidates, and therefore whether the black-preferred candidates were successful or defeated.

And there are no election returns, general or primary, for the 1966, 1968, 1970, 1982, 1988, or 1990 election cycles. The district court therefore likewise could not have known who were the representatives of choice of black voters in those elections, or whether or not they were defeated.

In making these observations, we do not suggest that the district court need analyze every election since 1965 in order to determine whether the minority-preferred candidates are usually defeated. We leave to another day the question of precisely how many elections must be considered in order for a district court's conclusions to be adequately supported. *Cf. Gingles*, 478 U.S. at 57 ("[A] pattern of racial bloc voting that extends over a period of time is more probative of . . . legally significant polarization than are the results of a single election."); *Hines v. Mayor and Town Council of Ahoskie*, 998 F.2d 1266, 1272 (4th Cir. 1993) ("[The] 'results' test [of section 2 of the VRA] 'supposes the need to consider multiple electoral contests.'" (quoting *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993))); *Baird*, 976 F.2d at 359 ("Any approach that depends on outcomes supposes the need to consider multiple electoral contests--the same position over many years, many positions during the same year, or both."); Collins I, 816 F.2d at 936 ("[W]hether there is a 'pattern of racial bloc voting that extends over a period of time' [is] a critical factor in a claim of vote dilution under § 2."); *see also Uno*, 72 F.3d at 985 ("[R]ace-conscious politics (or its absence, for that matter) can more readily be seen by producing a documentary that spans a series of elections than by taking an isolated snapshot of a single election."). Today, we hold merely that it is insufficient to consider selectively only those

elections in which minority candidates were on the ballot, at least where such elections are not such a substantial majority of the total elections that a fair assessment can be made of whether the minority-preferred candidates are usually defeated by white bloc voting.

III.

Plaintiffs challenge the methodology employed by the district court on numerous other grounds. Specifically, plaintiffs urge: 1) that the district court improperly viewed as minority-preferred candidates some candidates who finished second and third among black voters; 2) that it improperly treated candidates in the general election as black-preferred when those candidates assertedly received a majority of black votes only because they were Democrats; 3) that it improperly viewed success in the primary election as electoral success; and 4) that it failed to discount the weight attributed to the one repeatedly successful black candidate due to the effects of incumbency. We address each of these challenges in turn, finding no reversible error by the district court.

A.

Plaintiffs first contend that, contrary to our holding in *Collins v. City of Norfolk, Va.*, 883 F.2d 1232 (4th Cir. 1989) ("*Collins II*"), *cert. denied*, 498 U.S. 938 (1990), the district court considered as "black-preferred" some successful candidates who finished second and third among black voters, behind a *successful* black-preferred candidate. We agree that the district court erred, but not in the manner plaintiffs suggest. Rather, we conclude the district court erred in plaintiffs' favor by not treating as "black-preferred" some successful candidates who placed second or third among black voters (and with a significant majority of

black votes) behind an *unsuccessful* candidate who was the first choice of black voters.

1.

Because Alamance County's Board of Commissioners is elected from a single, multi-member district, citizens are permitted to vote for either two or three candidates in both the primary and general elections, depending on the number of seats up for election in any given year. Consequently, the district court in most cases treated the top two or three vote-recipients among black voters as the black-preferred candidates, as did plaintiffs' expert. If the first choice of black voters did not win an election, however, the district court excluded from consideration even as possible minority-preferred candidates those candidates who placed second or third among black voters behind the losing black-preferred candidate, in attempted reliance on our opinion in *Collins II*, 883 F.2d at 1238. In so doing, the district court, as even counsel for the plaintiffs conceded at oral argument, seems to have misread our opinion in *Collins II*. We did not, in *Collins II*, adopt a per se rule against considering, as minority-preferred, candidates who finished second or third among minority voters behind an unsuccessful candidate who was the minority community's first choice. We held only that,

> [t]he mere election of a candidate who appears to have received votes from more than fifty percent of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred by *a significantly higher percentage* of the minority community, who were defeated in the same election, then it cannot be fairly said

> that the minority community has successfully elected representatives of its choice. *Each such situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community.* The presumption must be that they cannot if some other candidate has received significantly more minority votes.

Id. at 1238 (emphases added) (quoting *Collins I*, 816 F.2d at 937).

Collins II, in other words, requires that a two-step inquiry be undertaken by the court in order to determine whether candidates who receive less support from black voters than an unsuccessful first choice may nevertheless be deemed black-preferred candidates in multi-seat elections. First, if the unsuccessful candidate who was the first choice among minority voters did not receive a "significantly higher percentage" of the minority community's support than did other candidates who also received a majority among minority voters, *Collins II*, 883 F.2d at 1238 (quoting *Collins I*, 816 F.2d at 937); *see also id.* at 1239 (referring to the level of support given to the unsuccessful candidate as "much greater"), then the latter should also be viewed by the district court as minority-preferred candidates. *Cf. Niagara Falls*, 65 F.3d at 1018 (treating as black-preferred a candidate who finished behind an unsuccessful first choice among black voters whose support "was not dramatically higher."). Second, if the level of support received by the unsuccessful first-place finisher among black voters was "significantly higher" than the support given the second- and third-place finishers by those same voters, then successful candidates who finished behind the unsuccessful first choice "are presumed not to be the minority's preferred candidates or representatives of

choice." *Id.* at 1238. Even so, the district court must still review "[e]ach such situation . . . individually to determine whether the elected candidates can be fairly considered as representatives of the minority community." *Id.* This is to say that *Collins II* requires an individualized determination in the circumstance where the unsuccessful first choice of black voters received significantly more support than the next-place finishers of the black voters. In this circumstance, the individualized determination is undertaken in order to ensure that the second- or third-place finishers, who, based upon their substantial support from the minority community would seem to be minority-preferred candidates, may in fact fairly be characterized as such.

In this case, black candidate Morris, for example, received 98% of the black vote in the 1972 Democratic primary election, and white candidates Long, Fleming, and Horne received 84%, 29%, and 16% of the black vote, respectively.[9] Long, Fleming, and Horne won the primary election. Notwithstanding the impressive support that Long received from black voters in the primary, the district court did not even consider whether Long might have been a black-preferred candidate. Because Morris' support among black voters was not "significantly higher" than Long's, the district court appears to have erred in not automatically treating Long as a black-preferred candidate. But even had Morris' level of support among black voters been significantly higher than Long's, the district court still would have erred in not making an individualized determination before rejecting Long as a black-preferred candidate.

Morris' support was significantly higher than the 29% received by Fleming. In such a circumstance, as in the case

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[9] Three other white candidates received 9%, 8% and 5% of the black vote, respectively.

directly addressed by *Collins II*,[10] a presumption against viewing Fleming as black-preferred is required by our holding in *Collins II*, which, as a panel, we are bound by. However, the district court should have made an individualized determination to assess whether that candidate, too, could properly have been deemed black-preferred. The district court also declined to treat successful white candidate Newlin as a black-preferred candidate in the 1978 Democratic primary, merely because Harris, the first choice of black voters, lost. There were two seats up for election that year, and Harris and Newlin were the top two vote-recipients among black voters, by far, with an estimated 78% and 60% of the black vote, respectively. *Significantly, the third place finisher among black voters was a black candidate, who received only 12% of the black vote.* Even were we to conclude that Harris' support among black voters was "significantly higher" than Newlin's, an individualized determination would still have been required before declining to treat Newlin as a black-preferred candidate. Again, we held in *Collins II* only that successful candidates who receive more than 50% of the black vote should not automatically be viewed as a black-preferred candidate if they receive significantly less support

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[10] Our holding in *Collins II* actually does not address this circumstance directly, since Fleming received less than majority support among black voters; *Collins II* addressed only the circumstance where a candidate receives more than 50% of the minority community's vote. Nevertheless, we do not believe that the mere failure to achieve a threshold of 50% in a multi-candidate election necessarily means that a candidate cannot be viewed as a black-preferred candidate. If the election had been held only among black voters, a hypothetical inquiry given some credence by the *Gingles* plurality, *see* 478 U.S. at 68 ("The essence of a submergence claim is that minority group members prefer certain candidates whom they could elect" if the election were held in a majority-black district), then Fleming would have won, because he was the third-place finisher among black voters in an election in which three seats were to be filled.

from black voters than another, losing candidate, not that they should never be treated as black-preferred.

2.

While the district court erred in automatically excluding, as possible minority-preferred candidates, the second- and third-place finishers behind an *unsuccessful* first choice among black voters, we do not believe the court erred, as plaintiffs contend, in not conducting an individualized determination with respect to every candidate who finished second or third among black voters behind *successful* black-preferred candidates, before treating them as black-preferred. Plaintiffs object to the fact that the district court considered some of the second and/or third place finishers as black-preferred in the three primary elections in which the first choice of black voters was successful--1976, 1980, and 1984. In the 1976 primary, for example, the district court treated both successful black candidate O'Kelley, who won 99+% of the black vote, and successful white candidate Fleming, who finished second among black voters with 47% of the vote, as black-preferred. The district court did not, however, consider successful white candidate Paris as black-preferred because he received only 16% of the black vote, even though that percentage placed him in a tie for third among black voters and thus may have been sufficient to win had the election been held only among black voters. *See supra* note 10. All three candidates went on to win in the general election, with 99+% of the black community's vote.

Plaintiffs object to the district court's treatment of these second and third place finishers as black-preferred candidates on the ground that, "[i]n most of these elections, . . . the black community fielded only one [black] candidate," Appellant's Br. at 20. In advancing this

argument, plaintiffs rely not on the holding in *Collins II*, but on a single passage from that case in which we said the following:

> If black voters exercised their right to cast all of their allotted votes, they ran the risk that their second and third choices would be declared their preferred candidates. Only by single-shot voting--withholding all votes save for their first choice, and forfeiting the opportunity to cast all votes allotted to each voter--could the minority be assured that its second and third choices would not be declared its preferred candidates. In contrast, under the at-large system, the white voters can freely cast all votes allotted to them without suffering the penalty imposed on the minority voters.

883 F.2d at 1239-40. Because *Collins II*, as explained above, addressed only the treatment of second- and third-place finishers behind an unsuccessful, not a successful, minority-preferred candidate, this passage is obviously *dictum* and not controlling here. And even were it applicable, the passage does not suggest the level of support necessary in order for such candidates to be considered minority-preferred.

We believe that it would be unwise to extend the holding in *Collins II* to instances in which the first choice among black voters was successful. Where the first choice of black voters was successful, there is simply no reason to presume that the minority community has been unsuccessful in electing representatives of its choice. Accordingly, we now hold that, in multi-seat elections in which voters are permitted to cast as many votes as there are seats, at the very least any candidate who receives a *majority* of the

minority vote and who finishes behind a *successful* candidate who was the first choice among the minority voters is automatically to be deemed a black-preferred candidate, just like the successful first choice. *Cf. Niagara Falls*, 65 F.3d at 1018 n. 18 (noting that parties did not dispute that candidates who received more than 50% were black-preferred). Candidates who receive less than 50% of the minority vote, but who would have been elected had the election been held only among black voters, are presumed also to be minority-preferred candidates, although an individualized assessment should be made in order to confirm that such a candidate may appropriately be so considered.

The district court appears generally to have conducted its analysis in the manner that we have described as appropriate. It considered as black-preferred candidates only those candidates who received substantial support from black voters;[11] it did not unquestioningly denominate as black-preferred the top two or three vote-recipients among the black community. Moreover, the court seems to have made an individualized determination before considering, as black-preferred, candidates such as Fleming who, in 1976, received slightly less than 50% of the black vote (47%), and in rejecting Paris, who in that same election only tied for third, with 16% of the black vote. We accordingly discern no reason to disturb the district court's determinations with respect to those candidates who finished second and third among minority voters, behind the minority community's *successful* first choice. Those determinations are not clearly erroneous. *See Gingles*, 478 U.S. at 77-79.

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[11] The level of support that may properly be deemed "substantial" will vary, of course, depending on the number of candidates on the ballot and the number of seats to be filled.

B.

Plaintiffs next object to the fact that the district court treated, as black-preferred, Democratic candidates who received 99+% of the black vote in general elections. Plaintiffs contend that to consider these candidates as black-preferred ignores that blacks in Alamance County overwhelmingly support Democrats in partisan elections. They argue that Democrats should be treated as black-preferred only if they were also black-preferred in the primary election. Therefore, they would have us discount, for example, the general election victories of Fleming in 1976 and Paris in 1980, both of whom received nearly unanimous black voter support, merely because they received "only" 47% and 48%, respectively, of the black vote in the primary elections. This argument is flawed in two fundamental respects.

First, as we discuss *infra*, acceptance of this argument would require that we carry forward the candidates' black-preferred status from the primary to the general election, when the Voting Rights Act is clearly concerned with whether blacks have an equal opportunity to elect the candidate of their choice in both nominations and elections. *See* 42 U.S.C. § 1973(b) ("A violation . . . is established if . . . it is shown that the political processes leading to *nomination or election* . . . are not equally open to participation by [citizens on account of race or color]." (emphasis added)); *cf. NAACP v. City of Columbia, S.C.*, 850 F. Supp. 404, 417 (D. S.C. 1993) (noting, as ironic, the fact that second choice of black voters, behind unsuccessful first choice, who went on to prevail in run-off election with majority of support from black voters, would not be considered preferred by either blacks or whites if level of support received in the initial primary election was the benchmark), *aff'd as modified on other grounds*, 33

F.3d 52 (4th Cir. 1994) (*per curiam*), *cert. denied*, 115 S.Ct. 1095 (1995). Thus, candidates who receive 99+% of the black vote in general elections are the black-preferred candidate *in that election*, regardless of their level of support in the primary. We reject the proposition that "success of a minority-preferred candidate in a general election is entitled to less weight when a candidate with far greater [minority] support was defeated in the primary." *Niagara Falls*, 65 F.3d at 1018. Such a view is grounded in the belief that minority voters essentially take their marbles and go home whenever the candidate whom they prefer most in the primary does not prevail, a belief about minority voters that we do not share. And such a view ignores altogether the possibility that primary election winners will become the minority's preferred candidate during the general election campaign, or that where, as here, the overwhelming majority of blacks vote in the Democratic primary, that a Republican could in fact become the black-preferred candidate in the general election by addressing himself to issues of interest to the minority community in a way that appeals to them as participants in the political process.

Second, under plaintiffs' theory, the district court would be required, contrary to *Gingles*, to assess the *cause* of the minority community's support of the candidate in determining whether the minority-preferred candidates usually are defeated by white bloc voting. *See infra* note 12. In *Gingles*, defendants argued that the plaintiffs were required to use multiple regression analysis, rather than bivariate regression analysis, to ensure that only those defeats of black-preferred candidates that were actually caused by race, and not some other reason such as party affiliation, were considered defeats of black-preferred candidates for purposes of a vote dilution claim. The *Gingles* plurality explicitly rejected such a requirement in

the context of assessing the second and third *Gingles* preconditions. 478 U.S. at 62, 106 S.Ct. at 2772.[12]

Moreover, even the limited election data in this record demonstrate that black voters do not vote monolithically, even in partisan general elections. White Democrats Holt and Thompson only received 69% and 83% of the black

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[12] Although only a four-Member plurality joined Section III(C) of the opinion, in which the rejection of defendant's multiple regression claim is found, Section III(C) is lengthy, and the dispute that cost Justice White's vote on the section was not over the "cause" issue.

Although most of our sister circuits have by now adopted the position that an inquiry into cause is relevant, *see, e.g., LULAC*, 999 F.2d at 850 ("[The] rigorous protections [of the Voting Rights Act], as the text of s 2 suggests, extend only to defeats experienced by voters 'on account of race or color.' "), they are still in disagreement about the stage in the vote dilution inquiry in which causation evidence is appropriate, *compare Nipper*, 39 F.3d at 1515 ("[I]f the evidence shows, under the totality of the circumstances, that the community is not motivated by racial bias in its voting patterns, then a case of vote dilution has not been made.") *with Clarke*, 40 F.3d at 812-14 (considering "cause" of the success rate of black-preferred candidates in assessing third *Gingles* element). We think the best reading of the several opinions in *Gingles*, however, is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, see *Gingles*, 478 U.S. at 62 (Brennan, J., plurality opinion), but relevant in the totality of circumstances inquiry, *see* 478 U.S. at 100 (O'Connor, J., concurring in judgment) (agreeing that use of racial polarization data "solely" to prove *Gingles* second and third elements cannot be rebutted by "evidence that the divergent racial voting patterns may be explained in part by causes other than race," but disagreeing with plurality's claim "that such evidence can never affect the overall vote dilution inquiry.").

Of course, whether causation is relevant to the second and third precondition inquiries or to the totality of circumstances inquiry, it would be just as relevant for determining whether particular minority-preferred candidates lose for some reason other than racial polarization, as it would be for determining, as plaintiffs urge, whether particular minority-preferred candidates win merely because of party affiliation.

vote, respectively, in the 1984 general election, and Democrat Morris, who is black, received only 57% of the black vote in the 1986 general election--*behind Democrat Bennett, who is white, who received 99+% of the black vote.* We therefore hold that the district court properly deemed all general election candidates who received 99+% of the black community's vote as black-preferred, without reference to the underlying primary election.

C.

Plaintiffs next contend that the district court erred in not distinguishing between, and separately analyzing, primaries and general elections, in determining whether black-preferred candidates were "usually" successful. With this contention, we agree.

Section 2(b) of the Voting Rights Act provides that a violation occurs if "the political processes leading to nomination or election . . . are not equally open" to all voters. 42 U.S.C. § 1973(b) (emphasis added); *see also* 42 U.S.C. § 1973l(c)(1) ("The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election. . . ."). The statute thus requires that minorities have an equal opportunity to participate not only in primary elections but also in general elections. From this, we believe it follows that the results in these two phases of the single election cycle must be separately considered and analyzed, and, in recognition of this statutory requirement, that *Gingles'* third precondition can be satisfied by proof that, in either the primary or the general election, the minority-preferred candidate is usually defeated by white bloc voting. Not to separately consider primary and general elections risks masking regular defeat in one of these phases with repeated successes in the other, and thereby misperceiving a process that is palpably in

violation of the Voting Rights Act, as not violative of the Act at all.

By way of illustration, an at-large voting method under which the candidates preferred by the minority community are always successful in the primary election but, because of white bloc voting, are always defeated in the general election (or one in which minority-preferred candidates are essentially barred from the general election ballot because of racial-bloc voting in the primary, *see White v. Regester*, 412 U.S. 755, 767 (1973) ("[T]he black community has been effectively excluded from participation in the Democratic primary selection process.")), is a voting method under which minorities are, because of white bloc voting, always unsuccessful in attaining elective office. By aggregating primary and general elections, however, a court would ineluctably find in both circumstances that minority-preferred candidates were successful fifty percent of the time, and therefore not "usually" defeated by white bloc voting.

The Supreme Court has held, in an analogous context, that courts must not rely on "aggregated" data "when considering several separate vote dilution challenges in a single case." *See Gingles*, 478 U.S. at 59 n. 28; *see also id.* at 101 (O'Connor, J., concurring in judgment) ("The District Court clearly erred in *aggregating* data from all of the challenged districts. . . ."). Because plaintiffs' challenge is, in reality, two separate vote dilution challenges--one to the at-large primary election scheme, and one to the at-large general election scheme--we believe that like reasoning must obtain here. Accordingly, we hold that primary and general election results should not be aggregated for purposes of determining whether black-preferred candidates are "usually" successful, and that the district court erred in so doing. Because plaintiffs in this

case would not prevail on their Section 2 claim even were the primaries and general elections considered separately, however, we will not reverse the district court on account of this error.

D.

Plaintiffs' final claim is that the district court erred in not discounting the weight attributed to O'Kelley's electoral successes because he was an incumbent. *See Gingles*, 478 U.S. at 57 ("[S]pecial circumstances, such as the absence of an opponent, *incumbency*, or the utilization of bullet voting, may explain minority electoral success in a polarized contest." (emphasis added)); *but see Smith*, 687 F. Supp. at 1317 ("The materiality of [evidence of incumbency] is questionable." (citing *Gingles*, 478 U.S. at 63 (plurality opinion))). O'Kelley, one of the successful black-preferred candidates whom the district court considered in determining whether black-preferred candidates usually were defeated, won three straight general elections (and, apparently, 5 elections total, including primaries) after first being appointed to a vacant seat. Although the district court provided no explanation of its decision not to discount O'Kelley's successes, we will not disturb that decision, given that plaintiffs' own expert did not analyze the effects of incumbency for O'Kelley or for any other candidate. To reverse as clearly erroneous the district court's decision under these circumstances would be to transform what was at most a narrow or "special" circumstance envisioned by the Court only in *dicta* into a categorical rule that all electoral successes of a minority-preferred incumbent are to be discounted. *See, e.g., Clarke*, 40 F.3d at 813-14 ("[I]ncumbency plays a significant role in the vast majority of American elections. To qualify as a 'special' circumstance, then, incumbency must play an unusually important role in the election at issue; a contrary rule would

confuse the ordinary with the special, and thus 'make practically every American election a "special circumstance."'" (quoting *Collins II*, 883 F.2d at 1250 (Chapman, J., dissenting)). Of course, as the defendants point out, and as counsel for the plaintiffs conceded at argument, "if incumbency were to be considered to discount the weight to be given to the success of one black candidate, O'Kelley, it likewise would have to be used to discount the weight given to the *defeat* of other black candidates who lost to incumbents, such as Harris in 1978 and Freeman in 1984." Appellee's Br. at 24, citing *Nipper v. Smith*, 39 F.3d 1494, 1538-39 (11th Cir. 1994)).

* * * * * *

The purpose of the Voting Rights Act is to ensure to minority citizens an equal opportunity to participate in the democratic processes and to elect candidates of their choice, candidates whom they believe will best represent their political interests. The Act's purpose is not to ensure the election of candidates of the minority's race, nor is it to ensure the election of candidates of any particular political party. In guaranteeing that minorities will be afforded an equal opportunity to participate in the political processes and to elect representatives of "their choice," the Act at once embodies the presumption and embraces the ideal that, in this Country, a candidate of any color can represent citizens of all colors, that a candidate of either party can represent the interests of all parties. Few presumptions are more fundamental to our system of representative democracy or more revealing of our commitment to equality and individual autonomy.

At bottom, through their collective arguments, plaintiffs urge a reading of the Supreme Court's decision in *Gingles*, and therefore an interpretation of Section 2, that would be

"at war" with this fundamental presumption, this ideal, which we believe not only informed Congress' enactment of Section 2, but underlay the Court's interpretation of that provision in *Gingles*. The reading of *Gingles* urged upon us would not simply guarantee to minority voters an equal opportunity to elect representatives of their choice, but would require the election of minority candidates: "Under the law, black voters must have an opportunity not just to elect candidates of their choice, but to elect *black* candidates of their choice." Appellant's Br. at 30. Such an interpretation, of course, is grounded ultimately in the twin presumptions that all members of a particular racial group will always prefer the same candidate and that that preferred candidate will always be of that group's race. We simply disagree that *Gingles* requires, or even permits, any such presumptions; indeed, we believe *Gingles* forbids such presumptions based upon race alone. And to the extent it can be read otherwise, we are convinced the Court would not so read the case today, given its unequivocal pronouncements that the principles of equal protection are offended by "assumption[s] that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls'." *Miller v. Johnson*, 115 S.Ct. 2475, 2486 (June 29, 1995) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)); *see also Shaw*, 509 U.S. at 648, 113 S.Ct. at 2827 ("'The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.'" (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting))).

The judgment of the district court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ERNESTINE LEWIS;	)	
SYLVESTER J. LEWIS,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
and	)	
	)	
MINETTA E. HILL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 95-2002**
	)	
ALAMANCE COUNTY, NORTH CAROLINA, including its Board of Commissioners and Board of Elections,	)	
	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Middle District of North Carolina, at Greensboro.
William L. Osteen, Sr., District Judge.
(CA-92-614)

Argued: March 5, 1996

Decided: November 4, 1996

Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges.

Affirmed by published opinion. Judge Luttig wrote the majority opinion, in which Chief Judge Wilkinson joined. Chief Judge Wilkinson wrote a concurring opinion. Judge MICHAEL wrote a dissenting opinion.

COUNSEL

ARGUED: Donnell Van Noppen III, PATTERSON, HARKAVY & LAWRENCE, Raleigh, North Carolina, for Appellants. J. Michael Crowell, THARRINGTON, SMITH, Raleigh, North Carolina, for Appellees. **ON BRIEF:** E. Hardy Lewis, THARRINGTON, SMITH, Raleigh, North Carolina; S.C. Kitchen, Alamance County Attorney, Graham, North Carolina, for Appellees.

WILKINSON, Chief Judge, concurring:

I agree that the judgment of the district court should be affirmed, and I concur in Judge Luttig's fine opinion. I write separately, however, to express my concern about the way in which my dissenting colleague interprets *Thornburg v. Gingles*, 478 U.S. 30 (1986). That case commands us, when analyzing claims of minority vote dilution, to determine whether "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 51.

The dissent's intensely race-conscious approach to that inquiry seems to me at odds with three recent Supreme Court cases which have held race-based redistricting schemes to be in violation of the Constitution. *See Bush v.*

Vera, 116 S.Ct. 1941 (1996); *Shaw v. Hunt*, 116 S.Ct. 1894 (1996); *Miller v. Johnson*, 115 S.Ct. 2475 (1995). *Gingles* may require us to engage in an inquiry which focuses on racial considerations, but it cannot be read to require us to adopt rules that unconstitutionlally tie American politics to racial identity. If my dissenting brother's view of *Gingles* prevails, we will be well on our way to the creation of racially separate electorates and a racially separate society. Nothing in Supreme Court precedent compels us to take America in that direction.

By reversing the district court, the dissent would lead us not only to a relentlessly race-conscious trial, but also toward the restructuring of Alamance County electoral districts along racial lines. This is just what the Supreme Court does not allow. *Bush*, *Shaw*, and *Miller* did not overrule *Gingles*, but they surely set limits on the ability of federal courts to cast voters as members of racial blocs rather than as individuals. In order to identify the "minority-preferred" candidate, we have been forced to wade into a bog of slippery assumptions and statistics. In this case alone, we have been asked to assault such impenetrable questions as: May a candidate who receives more than 50% of the minority vote, but who finishes behind a successful minority-preferred candidate, also be considered preferred by the minority? If the candidate who is most preferred by the minority is unsuccessful, may other successful candidates who received substantial minority support be considered as preferred by the minority? Should votes for candidates cast by minority voters in general elections be held not to express their true preferences when a candidate favored by minority voters in the primary election failed to win a place on the ballot for the general election? And, should votes for a minority-preferred candidate who is also an incumbent be disregarded

when analyzing the successes of minority-preferred candidates?

Where will this road of race-consciousness end? As the above questions demonstrate, the *Gingles* inquiry is complicated enough in a biracial community. Is the inquiry to become ever more refined and ever more complex as America becomes more multicultural? How do we identify minority-preferred candidates under *Gingles* when multiple minorities are present? How shall we determine whether a candidate supported to a greater or lesser extent by different minorities is the preferred candidate of a single minority? To what extent are the electoral interests of different racial minorities to be aggregated or kept separate? How broadly or narrowly are the categories of racial minorities to be defined? At some point, this race-based calculus will demonstrate only how far the law has set us on the path to disunion.

Entering this maze of racially laden inquiries reflects a view of American political life as a competition between highly segregated racial forces. Indeed, this is precisely the mistake of the dissent. The dissent's interpretation of *Gingles* will not allow courts to accept the votes of minority individuals as expressing their personal preferences. Instead, the dissent mandates that we pass the votes of minority individuals under a microscope in order to determine the racial preferences expressed by those voters.

Under the dissent's view, all electoral behavior is reducible to race. Thus, the dissent suggests that because voters prefer candidates of their own race, elections in which no minority was a candidate need not be counted. The dissent further suggests that minority votes for a candidate in a general election do not express a preference by the minority unless that candidate was also preferred by

the minority in the primary election; that a successful candidate who received more than 50% of the minority vote, but finished behind a successful candidate who received a higher degree of minority support, should not automatically be considered to be preferred by the minority; and that certain electoral successes of incumbent, minority-preferred candidates should not count towards the success of minority individuals in electing their preferred candidate.

And these are but a few of the racially-driven factors that the dissent would fasten upon the judicial review of American elections. In its recent cases, the Supreme Court has made it clear that there is no room in the Constitution for congressional redistricting schemes predicated predominantly on the basis of race. See *Bush v. Vera*, 116 S.Ct. 1941 (1996); *Shaw v. Hunt*, 116 S.Ct. 1894 (1996); *Miller v. Johnson*, 115 S.Ct. 2475 (1995). The dissent's interpretation of *Gingles* flies in the face of this command by proposing a set of intricate inquiries designed to reinforce the view of American politics as a contest between separate racial voting blocs. The tendency of such rules to "disrupt[ ] nonracial bases of political identity," *Bush*, 116 S.Ct. at 1962 (plurality opinion), will be no less than that of drawing district boundaries based on race, and they should be no more acceptable under the Constitution. "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." *Miller*, 115 S.Ct. at 2494. In leading us ineluctably to electoral remedies based on racial shares, the dissent "carr[ies] us further from the goal of a political system in which race no longer matters--a goal that the Fourteenth and Fifteenth Amendments embody, and to

which the Nation continues to aspire." *Shaw v. Reno*, 113 S.Ct. 2816 (1993).*

It will be said that racial bloc voting is already ensconced in American political life and that courts must learn to embody in law what is established in fact. A Constitution, however, has its aspirational as well as descriptive aspect. It is informed by the way things ought to be. Were the Fourteenth Amendment no more than a concession to the racial realities of the day, *Brown v. Board of Commissioners* would have remained an untaken step. Separation of the races is no better for America now than it was in 1954. It is a sad turn that has led the courts to rebuild the walls they once brought down.

MICHAEL, Circuit Judge, dissenting:

Since 1980 no minority candidate has been elected to Alamance County's five-member Board of Commissioners. Indeed, since the Voting Rights Act was first passed in 1965, only one minority candidate has ever been elected to the Board of Commissioners. That candidate was initially appointed (not elected), and when he was first elected after his appointment, he ran in a special election that was not

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* My good colleague suggests in dissent that the concurring opinion fails to follow the law--"even when it is a law that we might think unwise or unnecessary in today's world." Of course, the district court followed the law when it found that the Alamance County system conformed fully to section 2 of the Voting Rights Act and did not operate to deny black citizens an equal opportunity to elect candidates of their choice. In voting to reverse the district court, it is the dissent, I respectfully suggest, that has failed to follow the law, because it has mandated a collection of intensely race-conscious inquiries destined to result by way of remedy in the proportional allocation of electoral districts based on race. To pursue this course in the wake of the Supreme Court's repeated cautions against race-conscious districting is simply not supportable.

subject to Alamance County's at-large voting system. In light of this history, I believe that members of the black community in Alamance County would be truly surprised to learn that they enjoy the same opportunity as white voters to elect their preferred candidates as county commissioners. Yet, in light of this same history, the majority concludes that the plaintiffs have failed to demonstrate that minority-preferred candidates are usually defeated by white bloc voting and affirms the award of summary judgment to the County.

The majority offers two main reasons for its decision. First, the majority believes that the plaintiffs have failed to defeat the County's motion for summary judgment because the plaintiffs have not "proffer[ed] data from a sufficient number of elections to enable the district court to determine whether white bloc voting usually defeats minority-preferred candidates." *Ante* at 8. That is, because the plaintiffs have not proffered evidence from elections in which no minority was a candidate, the County is entitled to judgment as a matter of law. The majority reaches this conclusion even though the plaintiffs have proffered election data from every election in which a minority was a candidate, and even though the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), upheld a finding of vote dilution based on an analysis of election data that included results from only those elections in which a minority was a candidate and that covered only three election years.

Second, the majority believes that even if we only consider the election data that the plaintiffs have proffered, the plaintiffs have still failed to establish a violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973. In particular, under the majority's approach for determining who is and who is not a minority-preferred candidate, the

plaintiffs have failed to show that minority voters' preferred candidate is usually defeated by white bloc voting. In reaching this conclusion, the majority adopts a methodology that is unsound and unsupported by precedent. For example, even though primary election results provide a means for assessing minority voter preference without the effects of partisanship, under the majority's approach it is improper to consider primary election data when determining who is and who is not a minority-preferred candidate in the general election. *Ante* at 23-24. Thus, according to the majority, we should take raw election data in isolation and disregard the probative value of considering general election data in conjunction with primary election data (or in conjunction with any other circumstance in most cases).

Because I believe that neither of the majority's two reasons provide grounds for affirming the district court's grant of summary judgment, I respectfully dissent. At the very least, I believe that it is clear that the plaintiffs have offered ample evidence showing that there is a genuine issue of material fact of whether minority-preferred candidates are usually defeated by white bloc voting. Therefore, the district court's order granting summary judgment should be reversed and the case remanded for trial.

I.

The Supreme Court's decision in *Gingles* makes clear that the plaintiffs have the burden of proving each of the Court's three preconditions, *see Gingles*, 478 U.S. at 48, including whether "the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, . . . usually to defeat the minority's preferred candidate." *Id.* at 51, (citations omitted). And the plurality opinion of Justice Brennan emphasizes that "it is the *status* of the

candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important." *Id.* at 68 (Brennan, J., plurality opinion) (emphasis in original).[1] Yet, the Court's decision in *Gingles* notes that:

> The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to

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[1] Justice Brennan's opinion on this point failed to gain a majority of the Court, and it was joined by only Justices Marshall, Blackmun, and Stevens. Justice White, who otherwise joined Justice Brennan's opinion, rejected the notion that the race of the candidate is irrelevant. *Id.* at 83 (White, J., concurring). Justice O'Connor, in an opinion joined by Chief Justice Burger and Justices Powell and Rehnquist, agreed with Justice White that race of the candidate might affect the overall vote dilution inquiry. *Id.* at 101 (O'Connor, J., concurring). Justice White and Justice O'Connor were concerned that ignoring the race of the candidate may cause the successful election of a black candidate not to be counted for purposes of identifying racial polarization. For instance, because black voters often support the Democratic party, there was concern that the election of a black Republican candidate would not be viewed as a minority success. *See id.*, 478 U.S. at 83 (White, J., concurring) ("This is interest-group politics rather than a rule hedging against racial discrimination."); *id.* at 101 (O'Connor, J., concurring) (agreeing with Justice White that "Justice Brennan's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with *Whitcomb* [*v. Chavis*, 403 U.S. 124 (1971)] and is not necessary to the disposition of this case."). Of course, the majority opinion in the present case turns the opinions of Justice Brennan, Justice White, and Justice O'Connor on their collective heads. That is, whereas the Supreme Court in Gingles was concerned with whether to count the election of a black Republican for purposes of identifying racial polarization, the majority holds that the plaintiffs' action cannot withstand summary judgment because we must consider whether to count the election of white Democrats for purposes of identifying racial polarization.

> sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

Id. at 57 n. 25; *see Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1130 (3d Cir. 1993) ("The Supreme Court's language clearly indicates that an inability to offer statistical evidence on a large number of elections should not foreclose a voting rights claim.") *cert. denied*, 114 S.Ct. 2779 (1994); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) ("*Gingles* . . . suggests flexibility in the face of sparse data."), *cert. denied*, 492 U.S. 905 (1989).

Accordingly, the plaintiffs here, faced with the prospect of having to establish their vote dilution claim at trial, conducted a statistical analysis of all general and primary elections since 1972 in which a minority candidate was on the ballot for county commissioner. In total, the plaintiffs proffered election data from five general elections and six primary elections extending over twenty years. The election data included the general elections in 1974, 1976, 1980, 1984, and 1986, and the Democratic primaries in 1972, 1976, 1978, 1980, 1984, and 1992. See *Gingles*, 478 U.S. at 57 ("a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election").

In turn, the County proffered *no* election data of its own. Instead, the County moved for summary judgment arguing that the plaintiffs' own election data fails to support

their contention that the minority group's preferred candidates are usually defeated by bloc voting among white voters of Alamance County. Neither before the district court, nor in its briefs to this court, did the County argue that it was entitled to summary judgment because the plaintiffs had only analyzed elections involving minority candidates. In essence, however, that is what the majority has held here today.

I disagree with this result because I believe that the plaintiffs have in fact offered sufficient evidence from which a fair assessment can be made of whether minority-preferred candidates are usually defeated by white bloc voting. In addition, I believe that if the County wishes to rebut the plaintiffs' evidence of racial polarization based on evidence from elections in which no minority was a candidate, then the County should have the burden to produce such evidence.[2] I will elaborate on each of these points below.

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[2] Also, I do not share the majority's uneasiness with the plaintiffs' reliance on bivariate regression analyses. *See ante* at 5 n. 3. If the County wishes to challenge the plaintiffs' statistical evidence as flawed, then it should do so, and we should refrain from criticizing the statistical evidence in the absence of such a challenge. For instance, while it may (or may not) be true that "blacks and whites who live in integrated neighborhoods are more likely to vote for candidates of another race," *id.*, the County has put forth no evidence or argument on this appeal that the plaintiffs' election data is flawed because it treated minority preference as constant across precincts. *Cf. Smith v. Clinton*, 687 F.Supp. 1310, 1315 n. 6 (E.D.Ark.) (three-judge court) (noting that the defendants did not dispute the fact that a regression analysis is the "standard method for inferring the behavior of population groups from data collected for political units") (internal quotes omitted), *aff'd mem.*, 488 U.S. 988 (1988).

A.

No court before today has ever dismissed a vote dilution claim because the plaintiffs failed to proffer evidence of elections in which no minority was a candidate. And, of course, the majority does not expressly say that is what it is doing here. According to the majority, it "hold[s] merely that it is insufficient to consider selectively only those elections in which minority candidates were on the ballot, at least where such elections are not such a substantial majority of the total elections that a fair assessment can be made of whether the minority-preferred candidates are usually defeated by white bloc voting." *Ante* at 17. Yet, the majority makes clear that it believes that "both elections in which the candidates are of the same race and elections in which the candidates are of different races must be considered in order to determine whether white bloc voting usually defeats the minority-preferred candidate. . . ." *Id.* at 9 (emphasis added).

Of course, I agree that there must be sufficient election data presented from which a "fair assessment can be made" of the third *Gingles* precondition. I cannot, however, agree that a "fair assessment" must be based on data from a "substantial majority of the total elections." Nor can I agree that elections in which no minority was a candidate must be considered in all circumstances.

Despite what the majority believes, there is no requirement under section 2 of the Voting Rights Act or Supreme Court precedent that the plaintiffs offer election data from "a substantial majority of the total elections" in order to show that minority-preferred candidates are usually defeated by white bloc voting. Likewise, even though "a minority-preferred candidate may be either a minority or a non-minority," neither section 2 of the Voting Rights Act

nor Supreme Court precedent requires, as the majority claims, that we "must" consider (and plaintiffs must proffer) data from elections in which no minority was a candidate. *See ante* at 9. As I have said, not only did the decision in *Gingles* uphold vote dilution claims based on election data that included only those elections in which a minority was a candidate, but the Court specifically noted that "[t]he number of elections that must be studied in order to determine whether voting is polarized will vary according to the pertinent circumstances." 468 U.S. at 57 n. 25 (emphasis added). And no court (at least before today) has ever said that there is a *per se* rule requiring that election data from elections in which no minority was a candidate "*must*" be proffered. *Cf. Sanchez v. Bond*, 875 F.2d 1488, 1495 (10th Cir. 1989) ("We do not believe that a *per se* rule *against* examining races that have only white candidates is implicit in *Gingles*.") (emphasis added), *cert. denied*, 498 U.S. 937 (1990).[3]

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[3] The majority cites the decision in *Brown v. Board of Commissioners*, 722 F.Supp. 380, 391 (E.D.Tenn.1989), for the proposition that "a review of white/white elections as well as white/black elections is necessary to determine the existence of racially polarized voting." *Ante* at 13 n. 7. What, however, the majority fails to say is that the district court made this remark in the context of "this particular case." *Brown*, 722 F.Supp. at 391 (providing overview of elections in Chattanooga and stating that "blacks have . . . found themselves having to support white candidates in an effort to achieve a measure of political influence"). *See also Sanchez*, 875 F.2d at 1496 (affirming district court's decision to examine elections in which no minority was a candidate because the evidence showed that a candidate could not receive the nomination and support of the Democratic party without receiving minority support). Also, a court's leeway to examine elections in which no minority is a candidate does not mean that a court must examine such elections before a vote dilution claim can be established, and it certainly does not mean that a plaintiff must proffer such evidence in all cases (and on summary judgment). *Cf. Jenkins*, 4 F.3d at 1129 ("district court may, in its discretion, decide to allow the *defendants* to introduce evidence on which, if any, white candidates were minority-preferred") (emphasis added; footnote omitted).

This makes complete sense. While minority voters might prefer a candidate from the majority (*i.e.*, white) group, common experience shows that minority voters frequently prefer minority candidates. The opposite is true as well. *Gingles*, 478 U.S. at 68 (Brennan, J., plurality opinion) ("Because both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites.") (citation omitted); *Jenkins*, 4 F.3d at 1126 ("experience does demonstrate that minority candidates will tend to be candidates of choice among the minority community").

Moreover, even though voter preference is what matters, minority sponsorship of a candidate is the basis for determining whether a candidate is minority preferred. Of course, sponsorship can be proven in a number of different ways, and election data is only one of them. However, when a defendant neither argues nor proffers evidence that the minority has sponsored such a significant number of white candidates that a fair assessment can not be made without an analysis of election data from elections in which no minority was a candidate, I do not believe that we may require a plaintiff to proffer election data from white/white elections before a vote dilution claim can be proven.

Indeed, when the minority's only choice is to vote for a white candidate or not to vote at all, such elections are, in general, less probative on the issue of racial polarization than elections involving both black and white candidates. As the Fifth Circuit has said:

> "[T]he evidence most probative of racially polarized voting must be drawn from elections including both

> black and white candidates." "[W]hen there are only white candidates to choose from it is 'virtually unavoidable that certain white candidates would be supported by a large percentage . . . of black voters.'" Thus, it is not particularly surprising--and not particularly probative--that analysis of elections that included only white candidates did not reveal any racial polarization.

Westwego Citizens for Better Gov't v. City of Westwego, 946 F.2d 1109, 1119 n. 15 (5th Cir. 1991) (*Westwego III*) (citations omitted; quoting *Westwego I*, 872 F.2d 1201, 1208 n. 7 (5th Cir. 1989); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987), *cert. denied*, 492 U.S. 904 (1989)); *see ante* at 15 (listing cases in which courts have held that black/white elections are more probative than white/white elections). Therefore, if the defendant does not bring forth evidence of particular circumstances showing that minority voters often choose to *sponsor*, *Gingles*, 478 U.S. at 57 n. 25, and not merely vote for white candidates, I believe that "a fair assessment can be made" of the third *Gingles* precondition without the proffer of election data from elections in which no minority was a candidate.

A *fair* assessment is just that, and the plaintiffs in this case have offered more than sufficient election data from which we may discern election patterns in Alamance County. The plaintiffs' election data spans the twenty years preceding the filing of the plaintiffs' complaint in October of 1992. During those twenty years, there were ten county commissioner elections, and of those ten elections the plaintiffs have offered election data from five general elections and six primary elections. In other words, the plaintiffs have offered election data from a majority of the county commissioner elections held within the two decades

preceding the filing of their complaint. I believe it is clear that the proffer of such extensive election data as this satisfies the plaintiffs' burden to produce sufficient election data from which a fair assessment can be made. *See, e.g., Gingles*, 478 U.S. at 61 (concluding that "the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the legal standard"); *Uno v. City of Holyoke*, 72 F.3d 973, 985 (1st Cir. 1995) ("race-conscious politics (or its absence, for that matter) can more readily be seen by producing a documentary that spans a series of elections than by taking an isolated snapshot of a single election").

B.

While the plaintiffs have the burden of proving the *Gingles* preconditions, nothing prevents the defendant from offering election data of its own. And, as I have said, black/white elections are generally more probative than white/white elections. It therefore follows that if the plaintiffs have proffered election data sufficient to provide a "fair assessment" of the third *Gingles* precondition, and that election data only involves black/white elections, the defendant is free to counter with evidence of election data from elections in which no minority was a candidate. As the Third Circuit has said:

> We . . . do not believe that plaintiffs are required to present evidence on white versus white elections if they do not believe that those elections are probative. If the defendants want to introduce evidence on those elections in an attempt to rebut the plaintiffs' evidence of cohesiveness or white bloc

> voting, they may do so. Nevertheless, because white versus white elections tend to be less probative, there may still be cases in which "[t]he evidence of polarized voting . . . is so strong . . . that it cannot be overcome even when all reasonable inferences are accorded to the evidence of elections involving only white candidates."

Jenkins, 4 F.3d at 1128-29 (quoting *Smith*, 687 F.Supp. at 1317); see *Uno*, 72 F.2d at 988 & n. 8 (noting that when district court only examined elections involving minority candidates, "evidence exhumed from 'white only' elections may still be relevant in assessing the totality of the circumstances in a vote dilution case, especially if it tends to *rebut* the evidence of cohesion or white bloc voting extracted from 'mixed' elections") (emphasis added; citation omitted).

In this case, the County offered no evidence from white/white elections. And, in fact, the County has not even argued that such elections are probative. Accordingly, the majority is simply wrong to uphold the district court's decision granting summary judgment because the plaintiffs have not offered evidence from elections in which no minority was a candidate.

II.

The majority is also wrong to conclude that if we only consider the election data that the plaintiffs have proffered from black/white elections, the plaintiffs have still failed to establish a violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *Ante* at 8. In particular, I believe that the majority's (and the district court's) methodology for determining who is and who is not a minority-preferred candidate is fundamentally flawed and that the County is not

entitled to summary judgment when the election data put forth by the plaintiffs is properly considered.

Initially, I emphasize that the majority opinion does not squarely address the issue of the procedural posture of this case. We are hearing this case on appeal from the district court's grant of summary judgment in favor of the County, and not after a trial on the merits. Therefore, it is the moving party (i.e., the County) that has the burden of showing that there is no genuine issue of material fact requiring a trial, and we must draw all reasonable inferences in favor of the nonmoving party (i.e., the plaintiffs). In addition, while the plaintiffs here bear the ultimate burden of persuasion on their vote dilution claim, the County must show that there is an absence of evidence to support the plaintiffs' claim in order to succeed on summary judgment. *See, e.g., Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022, 1030 (D.Md.1994) (three-judge court) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). And while we have previously said that plaintiffs in a vote dilution case cannot "pass the summary judgment threshold" unless they establish all the *Gingles* preconditions, *McGhee v. Granville County*, 860 F.2d 110, 117 (4th Cir. 1988) (internal quotes and citation omitted), I believe that the plaintiffs here have adequately established the *Gingles* preconditions for purposes of defeating the County's motion for summary judgment.[4]

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[4] As I have noted, the County has not even argued that the plaintiffs must submit election data from white/white elections, nor has the County submitted any such data. In short, the County has not shown that the absence of data on white/white elections means that there is insufficient evidence to support the plaintiffs' vote dilution claim. Therefore, under basic summary judgment principles, I am at a loss as to how the majority can conclude that the County is entitled to summary judgment because the *plaintiffs* have not proffered election data from white/white elections.

Moreover, because we are reviewing this case on summary judgment, I do not believe that the district court's factual findings are entitled to deference. The district court assessed a paper record, and we should, as we normally do on summary judgment, review the court's findings *de novo*. *Cf. ante* at 22-23, 27-28 (upholding district court's factual findings under the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure).[5]

Of course, the legal standards that the district court applied are not entitled to any deference. And even if there

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[5] The Court in *Gingles* did not discuss what level of deference an appellate court is to accord a district court's factual findings on summary judgment. The Court did, however, stress that because of the fact intensive nature of a vote dilution claim, a district court's factual findings made after trial are subject to the clearly erroneous standard of Rule 52(a). As the Court said:

> We reaffirm our view that the clearly erroneous test of Rule 52(a) is the appropriate standard of appellate review of a finding of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the *trial court* is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of 'the past and present reality,'" [S. Rep. No. 417, 97th Cong., 2d Sess. 30 (1982), *reprinted* in 1982 U.S.C.C.A.N. 177, 208 (footnote omitted)], whether the political process is equally open to minority voters. "'This determination is peculiarly dependent upon the facts of each case,'" *Rodgers* [*v. Lodge*, 458 U.S. 613, 621 (1982)], quoting *Nevett v. Sides*, 571 F.2d 209, 224 (5th Cir. 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. 458 U.S. at 622.

Gingles, 478 U.S. at 79 (emphasis added). In the absence of a trial, it is difficult to imagine how the district court can make "a searching practical evaluation of 'the past and present reality'" to determine who is and who is not a minority-preferred candidate. Without such an evaluation, there is no reason or basis for deferring to the district court's factual findings under the clearly erroneous standard.

had been a trial on the merits in this case, we would still have the "power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Gingles*, 478 U.S. at 79 (internal quotes and citations omitted). Accordingly, I turn now to the errors of law that infected the district court's decision in this case--errors that the majority has simply compounded.

A.

The plaintiffs challenge the methodology employed by the district court on several grounds. First, the plaintiffs argue that the district court erred "[b]y grouping together white candidates for whom black voters voted only in the absence of other alternatives with candidates who were enthusiastically and overwhelmingly supported by black voters (and who were, with one exception, black). . . ." Appellants' Brief at 16. According to the plaintiffs, the fact that many white Democratic candidates received substantial electoral support from black voters in general elections does not show that these candidates are minority preferred. Rather, it is a reflection of the fact that when the only electoral choice is to vote for a white Republican or a white Democrat, blacks in Alamance County usually choose the white Democrat. Therefore, the district court should have conducted an individualized assessment of each candidate that received a majority of the minority's support in the general election to determine if that candidate was truly minority preferred. For example, the district court should have examined primary election results (nominating elections where the effects of partisan voting are minimized) to determine the black community's true level of support for a particular candidate.

Second, while the district court failed to examine primary elections to help determine who is and who is not minority preferred, the plaintiffs argue that the district court erred because it equated success in primary elections with success in general elections. This, according to the plaintiffs, is wrong because "winning the primary does not place the winner in office." *Id.* at 25.

Finally, the plaintiffs believe that the district court erred because it failed to discount the three election victories of Jack O'Kelley, the only black candidate ever elected to Alamance County's Board of Commissioners. *Id.* at 26. In particular, the plaintiffs contend that the district court should not have counted O'Kelley's election victories because O'Kelley first gained office by appointment, not election. In other words, unlike every other county commissioner, O'Kelley has always been an incumbent. Thus, the factual circumstances surrounding his election victories are not typical, and they provide little guidance for determining whether white bloc voting usually defeats the minority's preferred candidate.

The majority disagrees with much of what the plaintiffs argue, though to its credit the majority does correctly recognize that "primary and general elections results should not be aggregated for purposes of determining whether black-preferred candidates are 'usually' successful. . . ." *Ante* at 27. Thus, the majority evidently agrees with the plaintiffs that even though a minority-preferred candidate wins in the primary, this success alone does not count for purposes of determining whether the minority is usually able to elect its preferred candidates to office. And I too agree on this point.

Nevertheless, I cannot agree with the majority's conclusions with respect to the plaintiffs' other assigned

errors. According to the majority, the district court actually "erred in plaintiffs' favor by not treating as 'black-preferred' some . . . candidates who placed second or third among black voters (and with a significant majority of black votes) behind an *unsuccessful* candidate who was the first choice of black voters." *Ante* at 17-18. Also, the majority believes that the district court did not err when it failed to conduct an individualized determination of candidates who placed second or third among minority voters when the minority's first choice was successful. *Ante* at 22-23. Furthermore, the majority rejects the plaintiffs' argument that primary election results provide a basis to help determine whether a candidate is minority preferred in the general election. *See ante* at 23-26. And the majority believes that the district court did not err in giving full weight to the three election victories of Jack O'Kelley. *Ante* at 27.

I believe that in reaching these conclusions the majority has seriously misread the Supreme Court's decision in *Gingles*, our own precedent, and precedent from our sister circuits. As I explain below, the critical error that both the majority and the district court make is to isolate election data from the actual circumstances surrounding an election and then to treat such data as dispositive for purposes of determining who is a minority-preferred candidate (though, under most circumstances, the majority does not treat the data as dispositive for purposes of determining who is *not* a minority-preferred candidate).[6] Granted, election data (taken in isolation) provides some guidance in making a determination of who is and who is not a minority-preferred candidate. However, both section

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[6] When questioned at his deposition, the plaintiffs' expert fell into somewhat the same trap as the majority and the district court, acknowledging minority-preferred candidates based on election data taken in isolation.

2 of the Voting Rights Act and *Gingles* demand a more searching inquiry than mere reference to the percentage of minority voter support that a candidate has received, particularly when the candidate is not a minority and an at-large voting system is employed. At the very least, we must examine the particular circumstances of each case to discern whether the electoral support that minority voters give a candidate (especially in general elections) truly reflects minority voters' preference or whether such support is itself a manifestation of a structural inequality in the challenged voting system.

1.

We have covered much of this ground before. *See Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989) (*Collins II*), *cert. denied*, 498 U.S. 938 (1990).[7] At-large voting schemes may work to create the appearance of minority preference where none actually exists because once

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[7] In *Collins II* the minority plaintiffs challenged the at-large voting system used to elect the City Council in Norfolk, Virginia. We explained that "'[t]he essence of a s 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred candidates.'" *Id.* at 1236 (quoting *Gingles*, 478 U.S. at 47). We then stated that "[t]he proper identification of minority voters' 'representatives of their choice' is critical." *Id.* at 1237. And, we recognized that the plaintiffs' primary complaint was not that minority voters were unable to elect their first choice to the city council, but rather that the at-large voting system prevented minority voters from electing a second preferred candidate as well. *Id.* at 1240 ("In the context of this case it is necessary to apply *Gingles*' teaching to the black community's attempt to elect a second black councilman."). For this reason alone, the majority is wrong to say that *Collins II* left open the question of how to treat second- and third-place finishers when the minority's first choice is successful. *See* ante at 22. Because minority voters in Norfolk were able to elect one candidate, *Collins II* clearly addresses the situation where there is a successful minority-preferred candidate.

the number of seats up for election exceeds the number of candidates that minority voters "prefer," minority voters face the choice of either voting for a candidate that they do not actually prefer or not voting at all. Thus, the fact that a candidate receives a majority of the minority vote does not automatically make that candidate a minority-preferred candidate for purposes of the third *Gingles* precondition. As we explained in *Collins II*:

> The mere election of a candidate who appears to have received votes from more than fifty percent of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred by a significantly higher percentage of the minority community, who were defeated in the same election, then it cannot fairly be said that the minority community has successfully elected representatives of its choice. *Each situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community.* The presumption must be that they cannot, if some other candidate has received significantly more minority votes.

883 F.2d at 1238 (emphasis added; quoting *Collins IV*, 816 F.2d 932, 937 (4th Cir. 1987)).

Collins II thus demands a two-step inquiry. In the first step we decide whether there is a presumption that a candidate is or is not minority preferred. When an unsuccessful candidate receives a significantly higher percentage of the minority vote than candidates who win election with a majority of the minority vote, the elected candidates are presumed not to be minority preferred. When, however, an unsuccessful candidate receives a percentage of the minority vote which is not significantly

higher than that of the elected second- and third-place finishers, we presume that the second- and third-place finishers are minority preferred. Either way, however, the election data only creates a presumption.

In the second step of the inquiry the district court must determine whether the presumption is supported by other facts. The court must make an individualized determination of "whether the elected candidates can be fairly considered as representatives of the minority community." Depending on the outcome of the first step, there may be a presumption for or against finding that a candidate is minority preferred, but regardless of the presumption the district court must make an individualized determination in "[e]ach situation." Such an individualized determination is required, because as both Congress and the Supreme Court recognize, "whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process." S. Rep. No. 417, 97th Cong., 2d Sess. 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208; *Gingles*, 478 U.S. at 45 & 79.

The majority recognizes that *Collins II* demands a two-step inquiry. *See ante* at 19. The majority, however, misconstrues the inquiry. Under the first step, according to the majority, a second- or third-place finisher is minority preferred if the unsuccessful first choice received a percentage of the minority vote which is not significantly higher than that of the elected second- and third-place finishers. *Id.* In this situation, the majority believes that a district court need not (and evidently cannot) proceed to the second step of the inquiry in order to make the individualized determination required under the Act and *Gingles*. *Id.* at 20 ("Because [unsuccessful candidate] Morris' support among black voters was not 'significantly

higher' than [successful candidate] Long's, the district court appears to have erred in not *automatically* treating Long as a black-preferred candidate.") (emphasis added).

Needless to say, cutting off the inquiry at the first step makes a court's "searching practical evaluation of the past and present reality" dependent exclusively upon election results taken in isolation. Yet, because at-large voting systems often fail to provide an accurate view of the political process (among other things, they may create the appearance of minority preference), I believe that a court must proceed to the second step of the inquiry even when "the unsuccessful first choice among minority voters did not receive a 'significant higher percentage' of the minority community's support."

Of course, when the level of support received by the unsuccessful first-place finisher among minority voters is "significantly higher" than the support given the second- and third-place finishers by those same voters, the majority agrees that only a presumption is created against finding that the second- and third-place finishers are minority preferred. *Id.* at 21 (asserting that "we held in *Collins II* (sic) only that successful candidates who receive more than 50% of the black vote should not *automatically* be viewed as a black-preferred candidate if they receive significantly less support from black voters than another, losing candidate, not that they should never be treated as black-preferred") (emphasis in original). I fail, however, to discern any reason for creating the presumption (and proceeding to the second step) only when an unsuccessful first-place finisher receives a significantly higher percentage of the minority vote, and neither the Act, nor *Gingles*, nor *Collins II* supports the majority's conclusion to the contrary.

For much the same reason, the majority is also wrong to conclude that "any candidate who receives a *majority* of the minority vote and who finishes behind a *successful* candidate who was the first choice among the minority voters is automatically to be deemed a black-preferred candidate. . . ." *Ante* at 22 (emphasis in original). Indeed, under the majority's theory even when a *successful* minority-preferred candidate garners significantly higher minority support than successful second- and third-place finishers (who receive over 50 percent of the minority vote), a district court must automatically treat the successful second- and third-place finishers as minority-preferred candidates. And, in fact, the majority goes so far as to conclude that even though a candidate fails to gain a majority of the minority vote, there is a presumption that the candidate is minority preferred provided that the candidate would have won a seat in an at-large election among black voters. *Id.* at 22 (stating that "[c]andidates who receive less than 50% of the minority vote, but who would have been elected had the election been held only among black voters, are presumed also to be minority-preferred candidates, although an individualized assessment should be made in order to confirm that such a candidate may appropriately be so considered"). That has never been the law, nor should it be.[8]

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[8] The flaw in the majority's approach is illustrated by the following hypothetical. An at-large election for four slots is held. There are eight candidates. Candidate number 1 wins with 99 percent of the minority vote; candidate number 2 loses with 95 percent of the minority vote; candidate number 3 wins with 51 percent of the minority vote; candidate number 4 wins with 20 percent of the minority vote; candidate number 5 loses with 15 percent of the minority vote; candidate number 6 loses with 10 percent of the minority vote; candidate number 7 loses with 5 percent of the minority vote; and candidate number 8 wins with 3 percent of the minority vote. According to the majority, we must automatically treat candidate number 3 as minority preferred even though that candidate received far less support than candidate number 1 or candidate number 2. Also,

The only way that the majority can reach these conclusions is to disregard our clear language in *Collins II* and other precedent throughout the circuits. These are decisions that ***hold*** that a successful candidate is ***not automatically*** minority preferred merely because that candidate receives more than 50% of the minority vote. And these are decisions that either hold or assume that a candidate who receives less than 50% of the minority vote cannot (by definition) be minority preferred. As we stated in *Collins II*:

> The district court's error in finding successful candidates who received over 50% of the minority vote to be the chosen representatives of the minority community, despite the fact that other candidates received a much greater percentage of the minority vote, is not simply technical or semantic. . . .
>
> A moment's reflection shows how the district court's method of identifying the black community's representatives of choice defeats a primary purpose of the Act. In 1974, 21 candidates sought the 4 open seats on the council. In 1980, 12 candidates vied for 3 open seats. In 1974, each voter--black and white--could cast four votes and in 1980 three votes. If black voters exercised their right to cast all of their allotted votes, they ran the risk that their second and third choices would be declared their preferred candidates. Only by single-shot voting--

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according to the majority, there is a presumption that candidate number 4 is minority preferred even though that candidate received the support of only one in five minority voters. That cannot be right. It also directly conflicts with our holding in *Collins II*, because as I have previously noted, *see supra* at 49 n. 7, in *Collins II* (as in the above hypothetical), the minority was successful in electing its first candidate of choice. *See* 883 F.2d at 1240.

> withholding all votes save for their first choice, and forfeiting the opportunity to cast all votes allotted to each voter--could the minority be assured that its second and third choices would not be declared its preferred candidates. In contrast, under the at-large system, the white voters can freely cast all votes allotted to them without suffering the penalty imposed on the minority voters. The district court's construction of the Act defeats the congressional purpose of assuring that the opportunity to participate in the electoral process is open to all citizens.
>
> We are aware of *no* case that supports the district court's construction of the Act.

883 F.2d at 1239-40 (emphasis added); *see NAACP v. Niagara Falls*, 65 F.3d 1002, 1019 (2d Cir. 1995) ("a candidate *cannot* be 'minority-preferred' if that candidate receives support from fewer than 50% of minority voters.") (emphasis added); *id.* ("even if a candidate receives 50% or more of the minority vote, a court need not treat the candidate as minority-preferred if another candidate receives significantly higher support"); *Jenkins*, 4 F.3d at 1126 ("it is important to look beyond whether a white candidate received a majority of the minority community's vote and determine whether that white candidate is truly the minority community's representative of choice"); *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988) (rejecting the argument that "any time a candidate gets a majority of the minority votes he is the 'chosen representative' of the minority group"), *cert. denied*, 492 U.S. 905 (1989). *See also Uno*, 72 F.3d at 989 ("[D]etermining whether racial bloc voting exists is not merely an arithmetic exercise that consists of toting up columns of numbers, and nothing more. To the contrary, the district court should not confine

itself to raw numbers, but must make a practical, commonsense assay of all the evidence.") (citations omitted).

The effect of the majority's unprecedented decision will be to undermine the Voting Rights Act. After today, structural inequalities that may be at work in at-large voting systems will be masked by the structure itself, perpetuating those very inequalities that the Act is intended to remedy. The reason for this is simple. As I have explained, at-large voting systems may work to create the appearance of minority preference where none actually exists. Thus, to allow election results alone to dictate whether a candidate is minority preferred is to validate the structural inequalities which may be present in at-large voting systems based on the system itself. That is circular reasoning, I believe.

We are bound to follow *Collins II*. In sum, therefore, we should hold that a district court must always make an individualized determination of whether any second- or third-place finisher who receives a majority of the minority vote is actually minority preferred. When a minority-preferred candidate (whether successful or not) receives a significantly higher percentage of the minority vote, we must presume that the second- or third-place finisher who receives a majority of the minority vote is not minority preferred. When a minority-preferred candidate (whether successful or not) does not receive a significantly higher percentage of the minority vote, we must presume that the second-or third-place finisher is minority preferred, provided that the second- or third-place finisher received a majority of the minority vote. And when any candidate receives less than a majority of the minority vote, that candidate can never be deemed minority preferred.

I also believe that it is clear that when making an individualized determination of who is and who is not a minority-preferred candidate, a district court must examine the particular facts and circumstances surrounding each election and candidate in order to ascertain which, if any, candidate or candidates the minority community has sponsored. See *Gingles*, 478 U.S. at 57 n. 25. In other words, the district court must look at the totality of the circumstances in each situation.

There is nothing unique about this approach, and depending on the facts, it may help or hurt plaintiffs' ability to prevail in a vote dilution case. *See, e.g., Uno*, 72 F.3d at 989 (criticizing district court for failing to take into account city's "rapidly changing political environment" which may have allowed the minority group to sponsor successful candidates); *Jenkins*, 4 F.3d at 1129 ("In deciding which, if any, of the white candidates were minority preferred, the court must engage in a detailed, practical evaluation of the extent to which any particular white candidate was, as a realistic matter, the minority voters' representative of choice."); *Collins II*, 883 F.2d at 1238 ("in addition to the bare statistics, it is appropriate to consider testimony revealing how political observers and the candidates themselves viewed the city's claim that [the candidates] were the minority's preferred candidates and representatives of choice"); *Smith*, 687 F.Supp. at 1316-17 (emphasizing that "considerable weight" should be given to elections between black and white candidates, but still examining multiple factors to determine minority voters' representatives of choice).

Because we should examine the totality of the circumstances, a district court should not hesitate to look at any evidence that might be probative. Accordingly, I can

not agree with the majority that primary election results do not bear on the question of who is and who is not a minority-preferred candidate. *See ante* at 23-26. *Cf. Niagara Falls*, 65 F.3d at 1019 ("When a candidate receives support from 50% or more of minority voters in a general election, a court need not treat the candidate as minority-preferred when another candidate receiving greater support in the primary failed to reach the general election."); *Sanchez*, 875 F.2d at 1496 (examining totality of the circumstances, including "testimony to the effect that no candidate could secure the Democratic slot in county races without the support of a group of Hispanics that included some of the plaintiffs"). Moreover, I believe that while the race of the candidate is not dispositive, it too is a fact which in the totality of the circumstances the court may consider. *See Jenkins*, 4 F.3d at 1129. Again, "whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process." S. Rep. No. 417, 97th Cong., 2d Sess. 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208; Gingles, 478 U.S. at 45 & 79. A district court should not therefore refrain from examining election data from primaries in order to help determine who is and who is not a minority-preferred candidate. Nor should the district court ignore the fact that minority voters often support minority candidates.

When, for example, a white candidate fails to gain a majority of the minority vote in the primary election (yet still wins nomination), the fact that such a candidate subsequently gains a majority of the minority vote in the general election is of minimal probative value. This is especially true when minority voters strongly support a losing minority candidate in the primary election process.[9]

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[9] Obviously, while we should treat the defeat of a minority-preferred candidate in a primary as a defeat for purposes of determining whether

Simply put, while the majority may be correct to say that minority voters do not "take their marbles and go home whenever the candidate whom they prefer most in the primary does not prevail," *ante* at 24, the requirements of the Voting Rights Act are not met if "[c]andidates favored by blacks can win, but only if the candidates are white." *Smith*, 687 F.Supp. at 1318.[10]

Gingles' third precondition has been met, we should not treat the success of a minority-preferred candidate in receiving his or her party's nomination as a success for purposes of the same inquiry. Only if a minority-preferred candidate is actually elected has the minority succeeded in the electoral process. Winning the primary is all to the good, but without winning the general election, white majority bloc voting may have still succeeded in defeating the minority-preferred candidate or candidates.

[10] In *Jenkins* the Third Circuit outlined the following non-exhaustive list of factors that a court should examine when deciding whether a white candidate may properly be considered minority preferred:

> One relevant consideration is the extent to which the minority community can be said to have sponsored the candidate. In determining whether the minority community sponsored the candidate, the court should look to the level of minority involvement in initially advancing the particular candidate and in conducting or financing that candidate's campaign.
>
> Additionally, the attention which the candidate gave to the particular needs and interests of the minority community, including the extent to which the candidate campaigned in predominately minority areas or addressed predominately minority crowds and interests, may be relevant factors.
>
> Another relevant consideration would be the rates at which black voters turned out when a minority candidate sought office as compared to elections involving only white candidates. Finally, bearing in mind the disincentives that may exist for minority candidates to seek office, the extent to which minority candidates have run for office and the ease or difficulty with which a minority candidate can qualify to run for office may be relevant considerations.

As a district court must examine the totality of the circumstances to determine who is and who is not a minority-preferred candidate, a district court must also examine whether "special circumstances" have resulted in a minority-preferred candidate winning a particular election or elections. *Gingles*, 478 U.S. at 51 & 57. In such a case, a claim of vote dilution may still succeed because a pattern of racial bloc voting may still result in the defeat of minority-preferred candidates under normal election conditions. *See id.* at 57 ("the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest") (footnote omitted).

Here, for example, I believe that the district court erred when it counted as minority electoral success all three election victories of black candidate Jack O'Kelley. At the very least the district court should have discounted O'Kelley's first election victory in 1974. That election and the candidacy of O'Kelley were atypical for two reasons. First, O'Kelley was initially appointed (not elected) to fill a vacant slot on the Board of Commissioners. He thus ran as an incumbent even though he had never been elected. Second, and more importantly, the 1974 general election was both a special election for the seat to which O'Kelley had previously been appointed, and it was an at-large election for two other seats on the Commission. And, of course, O'Kelley ran in the special election, not the at-large

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4 F.3d at 1129 (citations omitted).

election. Thus, I would hold that as a matter of law O'Kelley's incumbency, coupled with his appointment and the unique nature of his 1974 election, constitute special circumstances requiring that we discount this election victory.

As for O'Kelley's second and third elections in 1976 and 1980, it may or may not be appropriate to count these elections as instances where the minority was successful in electing its preferred candidate. Because of the odd nature of the 1974 election, O'Kelley was forced to run for reelection after only two years (not the normal four years). Accordingly, there is evidence that "special circumstances" exist that also might require us to discount O'Kelley's 1976 election. As for the 1980 election, the effects of O'Kelley's initial appointment, coupled with his incumbency, may still persist. And, as the Court in *Gingles* expressly recognizes, incumbency may constitute a special circumstance in certain situations. 478 U.S. at 57. Accordingly, because we hear this case on an appeal from summary judgment, I would hold that there are genuine issues of material fact as to whether O'Kelley's second and third election victories should be counted for purposes of *Gingles*' third precondition. These fact issues should be resolved at trial, after the district court has examined the totality of the circumstances surrounding O'Kelley's second and third election victories.

B.

In light of the proper methodology described above, I turn now to examine the election data that the plaintiffs have proffered. Of course, because there has been no trial, and thus no "individual determinations" of who is and who is not a minority-preferred candidate, the district court's grant of summary judgment should be reversed for this

reason alone. In addition, even if we merely examine the election data, I believe it clear that the presumptions we recognized as appropriate in *Collins II* indicate that minority-preferred candidates have rarely been successful. I would therefore hold that there is a genuine issue of material fact as to whether minority-preferred candidates are usually defeated by white bloc voting and that the case should be remanded for trial.

The 1972 Election:

In 1972 Morris (a black candidate) received 98% of the black vote in the Democratic primary but was defeated nonetheless. Long (a white candidate) received 84% of the black vote and was nominated. No other candidate received a majority of the minority vote. Thus, assuming that 98% of the vote is not "significantly higher" than 84% of the vote, there is a presumption that we have two minority-preferred candidates--one of whom we know lost (Morris). Because neither party has proffered election data from the 1972 general election, it would appear that we cannot determine whether Long was successful or not in the general election. However, candidate Long also ran in the 1974 election. It is thus apparent that Long was not elected in 1972. Accordingly, we may presume that minority voters were not able to elect either of their preferred candidates in 1972.

The 1974 Election:

The parties have failed to provide the primary results from the 1974 Democratic primary, but Newlin (a white candidate) won the general election with 99% of the black vote, and Long lost with 99% of the black vote. I will therefore count Newlin as a successful minority-preferred candidate and Long as an unsuccessful minority candidate

(though again the record is incomplete on this point). Also, as I have said, O'Kelley's election is not counted because he had recently been appointed to the Board of Commissioners, and he was running to fill a single vacant seat. Thus, as of 1974 there is a presumption that there had been four minority-preferred candidates, one candidate who was elected and three candidates who were not.

The 1976 Election:

In 1976 only O'Kelley received the support of a majority of black voters in the Democratic primary election. Therefore, he is the only candidate that should be presumed minority preferred. But again, because O'Kelley did not serve a full term after his 1974 election, it may be inappropriate to count his success in the general election. Thus, as of 1976 there still had been only four minority-preferred candidates, only one of whom was elected.

The 1978 Election:

In the 1978 Democratic primary, Harris (a black candidate) received 78% of the black vote but was not nominated, and Newlin (a white candidate) received 60% of the black vote and was nominated. The majority does not disagree that Harris's support among minority voters was significantly higher than Newlin's support. See ante at 613-614. In addition, the district court reached the same conclusion. We should therefore presume that there was only one minority-preferred candidate in 1978 (Harris). Because he was unsuccessful, as of 1978 there had been five minority-preferred candidates, one candidate who was elected and four candidates who were not.

The 1980 Election:

In the 1980 Democratic primary, O'Kelley received 99% of the black vote and was nominated, and Fleming (a white candidate) received 57% of the black vote but was not nominated. No other candidate received a majority of the minority vote in the primary. Thus, for purposes of summary judgment I would not count either O'Kelley or Fleming as minority preferred. The effects of O'Kelley's initial appointment (coupled with his incumbency) may still persist, though less so than in 1974 and 1976. And Fleming did not receive "significantly" close to the same amount of support as O'Kelley. Accordingly, as of 1980, there remained five minority-preferred candidates, one candidate who was elected and four candidates who were not.

The 1984 Election:

In the 1984 Democratic primary, Freeman (a black candidate) received 98% of the black vote and was nominated. Paris (a white candidate) received 50% of the black vote but was not nominated. Because Freeman's minority support was significantly higher than Paris's, I would presume that Paris was not a minority-preferred candidate. In the general election, Freeman lost. Therefore, as of 1984 there had been six minority-preferred candidates, one who was elected and five who were not.

The 1986 Election:

The parties have not provided primary results for 1986. In the general election, however, Bennett (a white candidate) won with 99% of the black vote. I will therefore count him as a successful minority-preferred candidate. However, Morris (a black candidate) lost the general election, though he got 57% of the black vote. Although

Morris is a minority and received a majority of the minority vote, I will nonetheless presume that he is not a minority-preferred candidate because Bennett received significantly higher support. Therefore, as of 1986 we should presume that there had been seven minority- preferred candidates, two who were elected and five who were not.

The 1992 Election:

In the 1992 Democratic primary, Torain (a black candidate) received 74% of the black vote in the primary but was not nominated. No one other candidate received a majority of the black vote. I thus presume that Torain was the only minority-preferred candidate in 1992.

In total, therefore, we should presume that there have been eight minority-preferred candidates, two who were elected and six who were not. Accordingly, based only upon the election data proffered, I believe that the County is not entitled to summary judgment. *See Gingles*, 478 U.S. at 75 ("the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim"). And, I reemphasize, this analysis only shows which candidate (whether black or white) the court should presume to be minority preferred. An individual determination as to each candidate should be made after trial to ensure that all minority-preferred candidates have been properly identified.

* * * * *

It is no doubt true that we may not (and should not) simply assume that " 'voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Ante* at

29 (quoting *Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995) (quoting *Shaw v. Reno*, 509 U.S. 630, 647, 1993))). Some black voters may prefer white candidates, some white voters may prefer black candidates, and most voters (I would hope) may not care if their preferred candidate is black or white. Still, a particular voting system may work to prevent black voters from having the same opportunity to elect their chosen representatives as white voters, and such a system violates the law. *See Shaw*, 509 U.S. at 652 (recognizing that a vote dilution claim is "analytically distinct" from a claim that the state has used race as a basis for separating voters into districts). *Accord Miller*, 115 S. Ct. at 2485-86.[11]

Here, the plaintiffs have proffered sufficient evidence to defeat the County's motion for summary judgment because that evidence shows that a genuine question of fact exists as to whether the at-large method for

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[11] Evidently, however, under the views expressed in the concurring opinion such a system would *not* violate the law. Of course, to reach that conclusion we would have to read the Voting Rights Act out of existence, something I do not believe that the Supreme Court has done in *Bush v. Vera*, 116 S. Ct. 1941 (1996), *Shaw*, *supra*, or *Miller*, *supra*. Indeed, I know of nothing unconstitutional about Congress forbidding electoral schemes that "are not equally open" and that operate to provide minority members with "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Likewise, there is nothing unconstitutional about requiring the trial court "to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters." Gingles, 478 U.S. at 79 (citation and internal quotes omitted). While we, as the appellate court, might therefore be faced with hard questions on review (though I doubt that they are "impenetrable" ones), we must nonetheless decide whether the trial court has correctly followed the law--even when it is a law that we might think unwise or unnecessary in today's world. And I must respectfully differ with my concurring colleague if he regards that as an "intensely race-conscious approach." *See ante* at 32.

electing commissioners in Alamance County deprives black voters of the same opportunity to elect representatives of choice as is enjoyed by white voters. The County may ultimately prevail on that question, but without a trial neither we, nor the County, nor the citizens of Alamance will know. Again, I respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
December 4, 1996

No. 95-2002
CA-92-614

ERNESTINE LEWIS; SYLVESTER J. LEWIS

Plaintiffs-Appellants

and

MINNETTA E. HILL

Plaintiff

v.

ALAMANCE COUNTY, NORTH CAROLINA, including its Board of Commissioners and Board of Elections

Defendant-Appellee

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
CLERK